United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 26 1957
Joseph W. Stewart
CLERK

No. 14,182

969

PHYLLIS NIELSEN,

Appellant,

v.

BARCLAY CORPORATION,
A Body Corporate, et al.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

396 [Filed Apr. 7, 1955]

PHILLIS NIELSEN (LUCEY)
Arlington Towers
Arlington, Virginia

Plaintiff

vs.

Civil Action No. 1579-55

BARCLAY CORPORATION,
a Body Corporate
Serve: Harold Bobys, Officer
1331 G Street, N.W.
Washington, D.C.

and

SIDNEY Z. MENSH
t/a SIDNEY Z. MENSH & COMPANY
1613 Eye Street, N.W.
Washington, D.C.

Defendants

jury action

COMPLAINT FOR PERSONAL INJURIES
(Fall at Apartment House)

The plaintiff respectfully represents to this Honorable Court as follows:

1. That she is an adult citizen of the United States and a resident of the State of Virginia, and brings this suit in her own right.

2. The defendant, Barclay Corporation, is a body corporate doing business in the District of Columbia as owner and operator of a group of apartment buildings, including one building known as premises, 2610 Tunlaw Road, N.W. That the defendant, Sidney Z. Mensh, t/a Sidney Z. Mensh Company, is engaged in the real estate business in the District of Columbia and was and is managing agent of the defendant, Barclay Corporation, in the operation and maintenance of premises, 2610 Tunlaw Road, N.W. That the defendants are sued jointly and severally.

3. This Court has jurisdiction on diversity of citizenship and the

fact that this claim exceeds the sum of Three Thousand Dollars ($3,000).

4. That on or about the 26th day of February, 1954, the defendant, Barclay Corporation was the owner and the defendant, Sidney Z. Mensh Company, was the managing agent of an apartment building located at premises, 2610 Tunlaw Road, N.W., Washington, D.C. That the said defendants on the date and at the address aforementioned had sole and
397 exclusive control over the installation, construction and maintenance of the approaches, and entrance to said apartment building.

5. That on or about the 26th day of February, 1954, while lawfully using the approaches and entrance to premises, 2610 Tunlaw Road, N.W., the plaintiff was caused to fall and sustained serious personal injuries, including a severe fracture to her left arm, which required hospitalization, surgery and which has left her with permanent impairment in the use of her arm. Plaintiff also sustained aggravation of a pre-existing nose condition.

6. That the injuries sustained by the plaintiff were the sole result of the negligence of the defendants and in each of them in their failure to maintain the approaches to premises, 2610 Tunlaw Road, N.W., in a safe condition in their failure to provide adequate lighting facilities for the outside entrance of said premises of said premises, in their failure to complete the installation of an outside light for said premises after beginning same, in failure to comply with pertinent District of Columbia regulations, and in constructing the entranceway to said premises in a manner dangerous to persons lawfully using the approaches and entranceway to said apartment building. That the defendants and each of them had actual and/or constructive knowledge of the lack of adequate lighting facilities at the entranceway to premises, 2610 Tunlaw Road, N.W., and of the dangerous condition of said entranceway to persons lawfully using the approaches and entrance.

7. That plaintiff has been obliged to spend substantial sums in an effort to correct or cure herself of the injuries sustained and will likely be obliged to expend sums in the future; that she has lost time from

employment and as a result of her permanent arm injury her earning capacity has been likewise impaired.

WHEREFORE, plaintiff brings this suit against the defendants and claims of them, jointly and severally the sum of Thirty-Five Thousand Dollars ($35, 000. 00).

/s/ Harry W. Goldberg
/s/ Morris Altman
Attys. for Pltff.

* * *

Plaintiff demands trial by Jury on all issues

/s/ Harry W. Goldberg

---

398 [Filed May 10, 1955]

ANSWER OF DEFENDANTS

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the numbered paragraphs of the complaint, defendants aver:

1, 2, 3 and 4. Defendants Barclay Corporation and Sidney Z. Mensh, trading as Sidney Z. Mensh & Company, admit the allegations contained in paragraphs numbered 1, 2, 3 and 4 of the complaint.

5. Defendants deny the allegations contained in paragraph 5 of the complaint except that defendants are without knowledge or information sufficient to enable them to form a belief as to the allegations of
399 injuries and aggravation of a pre-existing condition claimed by plaintiff.

6. Defendants deny the allegations contained in paragraph 6 of the complaint.

7. Defendants are without knowledge or information sufficient to enable them to form a belief as to the allegations contained in paragraph

7 of the complaint.

Third Defense

The construction of the apartment buildings owned by defendant Barclay Corporation, and managed by defendant Sidney Z. Mensh, including premises 2610 Tunlaw Road, N.W., had not been fully and finally completed on the date of the alleged injury; certain work in and about the entrances to 2610 Tunlaw Road was not completed; both plaintiff and any guests whom she may have intended to visit in the said apartment house knew, or in the exercise of reasonable care should have known, of the unfinished condition of some of the work around the entrance to the premises. Plaintiff assumed any risk attendant to the aforesaid unfinished condition of the apartment house in and about the entrance to said 2610 Tunlaw Road, N.W.

Fourth Defense

Plaintiff visited premises 2610 Tunlaw Road, N.W., a number of times prior to the date of the accident, was familiar with the entrance thereto, its lighting and its condition. Plaintiff accordingly assumed the risk, if any, of injury growing out of the conditions complained of.

400

Fifth Defense

Any injuries or financial loss sustained by plaintiff was caused or occasioned by her own negligence or contributory negligence.

WHEREFORE, defendants demand judgment, together with the costs of this suit.

O'DONOGHUE & O'DONOGHUE

By Daniel W. O'Donoghue, Jr.

* * *

Attorneys for Defendants

(Certificate of Service)

401 [Filed May 13, 1955]

INTERROGATORIES PROPOUNDED TO PLAINTIFF UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The following interrogatories are propounded under Rule 33 of the Federal Rules of Civil Procedure. Each of the interrogatories must be answered fully under oath, in writing, and said answers must be filed and served upon counsel for the defendants within fifteen days of the date of the receipt of these interrogatories.

1. Under what circumstances and for what purpose did you go to the premises 2610 Tunlaw Road, N.W., Washington, D.C., on February 26, 1954?

2. How many times and on what dates had you previously gone onto these premises?

3. Had you always used the same entranceway in going into and coming out of the apartment house?

4. If not, how many times had you used the entranceway where you claim you were injured?

5. Who did you visit at 2610 Tunlaw Road?

6. Give the full names and present addresses of all witnesses to said accident.

7. Specify the "pertinent District of Columbia regulations" you claim defendants failed to comply with.

402 O'DONOGHUE & O'DONOGHUE

by /s/ Ross O'Donoghue

* * *

Attorneys for Defendants

(Certificate of Service)

403 [Filed May 16, 1955]

INTERROGATORIES

The plaintiff propounds the following interrogatories to the defendant, Sidney Z. Mensh, to be answered under oath and in accordance with the requirements and provisions of Rule 33 of the Federal Rules of Civil Procedure.

1. Please state the date when an apartment in premises, 2610 Tunlaw Road, N.W., was first occupied by a tenant.

2. Please state the name and address of the first tenant to move into premises, 2610 Tunlaw Road, N.W.

3. How many apartment units are contained in premises, 2610 Tunlaw Road, N.W.?

4. How many apartment units located in premises, 2610 Tunlaw Road, N.W., were tenant occupied on February 26, 1954?

5. Please state the names, addresses and apartment number of all tenants of premises, 2610 Tunlaw Road, N.W., on February 26, 1954.

6. Please state date when first began offering apartments in premises, 2610 Tunlaw Road, N.W., for rental.

7. Please state name and address of the Resident Manager of premises, 2610 Tunlaw Road, N.W., on February 26, 1954.

* * * * * * *

404 /s/ Harry W. Goldberg

Attorney for Plaintiff

* * *

(Certificate of Service)

405 [Filed May 16, 1955]

INTERROGATORIES

The plaintiff propounds the following interrogatories to the defendant, The Barclay Corporation, to be answered under oath and in accordance with the requirements and provisions of Rule 33 of the Federal Rules of Civil Procedure:

1. Please state date on which construction of premises 2610 Tunlaw Road, N.W., was commenced.

2. Please state date on which the construction of the premises, 2610 Tunlaw Road, N.W., was completed.

* * * * * * *

12. Please state name and address of the electrician and the electric company which installed outside light at entrance of premises, 2610 Tunlaw Road, N.W. and date on which said installation of outside light was made.

* * * * * * *

406 17. Please state date on which Certificate of Occupancy was issued for premises, 2610 Tunlaw Road, N.W.

/s/ Harry W. Goldberg

Attorney for Plaintiff

* * *

(Certificate of Service)

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407 [Filed May 27, 1955]

ANSWERS TO INTERROGATORIES PROPOUNDED TO PLAINTIFF

1. Accompanied friends who had taken an apartment in these premises.

2. Had been to these premises on one previous occasion. Do not recall precise date.

3. Had entered and left through front entrance on the one occasion that I was in the building prior to my accident.

4. See answer to Question No. 3.

5. Was going to apartment of Howard Tanner and John B. Nielsen at time of accident.

6. John B. Nielsen, c/o G2, The Pentagon, Arlington, Virginia. Howard Tanner, present address unknown.

7. I am personally unable to answer this question, but am advised by my attorney that he will provide the information requested by this interrogatory.

/s/ Phyllis Lucey

District of Columbia, ss:

Subscribed and sworn to before me this 25th day of May, 1955.

/s/ Max M. Goldberg

Notary Public, D.C.

* * *

(Certificate of Service)

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408 [Filed Aug. 23, 1955]

ANSWERS OF DEFENDANT BARCLAY CORPORATION TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

Sidney Z. Mensh, vice president of Barclay Corporation, being on oath duly sworn, makes the following answers to the interrogatories propounded by plaintiff under Rule 33 of the Federal Rules of Civil Procedure.

1. June 10, 1953.

2. Construction virtually completed by March 2, 1954; first rental was February 15, 1954.

* * * * * * *

12. Dorsett Electric, 422 Washington Building, 15th and New York Avenue, Washington, D.C. Do not know name of electrician.

[Sept. 23, 1955]

310 "Dear Mr. Goldberg:

"I have attempted to obtain the information which you asked for in your letter of August 25th which was part of Interrogatory No. 12 to the Barclay Corporation. I have been advised that the records of the corporation do not indicate on what date the outside light was installed at 2610 Tunlaw Road, Northwest. They have tried to find out from the electrician the date of installation but he doesn't know. They said that the best recollection of the date of installation was that it was made one or two days after the completion of the building. Since the building was completed on March 2, 1954, the light was installed on March 3rd or 4th. Since I suppose you wish to say it was installed after February 26th, I trust that this answer is sufficient for your purposes and may be considered a stipulation to that effect.

very truly yours,

"Signed: Ross O'Donoghue."

409 * * * * * * *

17. November 2, 1954.

BARCLAY CORPORATION

By /s/ Sidney Z. Mensh

* * *

(Certificate of Service)

410 [Filed Aug. 23, 1955]

ANSWER OF DEFENDANT SIDNEY Z. MENSH TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

Sidney Z. Mensh, being on oath duly sworn, makes the following answers to the interrogatories propounded by plaintiff under Rule 33 of the Federal Rules of Civil Procedure.

1. Mrs. Lokenan, Resident Manager, moved into apartment 103 prior to February 15, 1954. Exact date not known, however Mrs. Irene C. Hudson, in apartment 101, moved in on February 15, 1954.

2. Mrs. Irene Hudson, apartment 101, 2610 Tunlaw Road, N. W.

3. Fourteen units.

4. Five units.

5. Howard Tanner, Apartment 1, 2610 Tunlaw Road, N. W.; Irene Hudson, Apartment 101, 2610 Tunlaw Road, N. W.; Angel Blanco, Apartment 102, 2610 Tunlaw Road, N. W.; John Lokenan, Apartment 103, 2610 Tunlaw Road, N. W., and Augusta Pentecost, Apartment 203, 2610 Tunlaw Road, N. W.

411 6. Apartments were offered for rent during the construction period and accepting applications as early as January 1, 1954.

7. Mrs. John Lokenan, Apartment 103, 2610 Tunlaw Road, N. W. Present address: 6743 Fairfax Road, Bethesda, Maryland.

* * * * * * *

/s/ Sidney Z. Mensh

Subscribed and sworn to before me this 18th day of August, 1955.

/s/ Betty R. Straw, Notary Public, D. C.

* * *

(Certificate of Service)

412 [Filed May 24, 1957]

MOTION FOR A NEW TRIAL

Comes now the plaintiff by her attorneys of record and respectfully moves this Honorable Court to grant unto her a new trial in the above entitled cause and, for reasons, states as follows:

1. This Honorable Court erred in granting defendant's motion for a directed verdict in favor of Sidney Z. Mensh, trading as Sidney Z. Mensh and Company, at the conclusion of plaintiff's opening statement and for reasons as are more fully set forth in the Memorandum of Points and Authorities attached hereto and asked to be considered in connection herewith:

(a) Plaintiff alleges that the opening statement by her counsel set forth sufficient proposed proof of liability to constitute a cause of action against the defendant, Sidney Z. Mensh. The Courts of Appeal have held uniformly in this jurisdiction that to direct a verdict on opening statement, it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists.

2. This Honorable Court erred in granting defendant's motion for a directed verdict at the conclusion of plaintiff's case against the Barclay Corporation and for reasons as are more fully set forth in the memorandum of Points and Authorities attached hereto and asked to be considered in connection herewith.

(a) The Court erred in finding at conclusion of plaintiff's case that there was an assumption of risk by the defendant's tenant as a matter of law, and a resulting assumption of risk as a matter of law by the plaintiff invitee.

(b) The Court erred in finding at the conclusion of plaintiff's

413 case that there was contributory negligence by the plaintiff as a matter of law. It is basic that for the Court to be justified in declaring plaintiff contributorily negligent as a matter of law, evidence of such negligence must be so clear and unmistakable that no reasonable basis remains for an inference to the contrary.

3. And for other reasons to be argued on hearing.

/s/ HARRY W. GOLDBERG, Of Counsel,

* * *

(Certificate of Service)

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422 [Filed May 15, 1957]

ORDER AMENDING CAPTION

Upon motion made by the plaintiff and consented to by the defendants, it is, by the Court this 15th day of May, 1957,

ORDERED that the caption in the above entitled cause be and the same is hereby amended to read PHYLLIS NIELSEN vs. BARCLAY CORP., ET AL.

By the Court:

/s/ F. DICKINSON LETTS

Judge

CONSENT:

/s/ Ross O'Donoghue

---

423 [Filed May 15, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 14th day of May, 1957, before the Court and a jury of good and lawful persons of this district, to wit: (list of twelve jurors' names) who, after having been duly sworn to well and truly try the issues between Phyllis Nielsen, Plaintiff, and Barclay Corporation, A Body Corporate and Sidney Z. Mensh, t/a Sidney Z. Mensh & Company, Defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 15th day of May, 1957, that they find for the defendant Sidney Z. Mensh t/a Sidney Z. Mensh & Company against said plaintiff by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant Sidney Z. Mensh t/a Sidney Z. Mensh & Company go hence without day, be for nothing held and recover of plaintiff his costs of defense.

Harry M. Hull, Clerk,
By /s/ Anne W. Lyddane
Deputy Clerk

By direction of
Judge F. DICKINSON LETTS

---

424 [Filed May 20, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 14th day of May, 1957, before the Court and a jury of good and lawful persons of this district, to wit: (list of twelve jurors' names) who, after having been duly sworn to well and truly try the issues between Phyllis Nielsen, plaintiff and Barclay Corporation, a body corporate, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 20th day of May, 1957, that they find for the defendant against said plaintiff by direction of Court.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiff their costs of defense.

Harry M. Hull, Clerk,
By /s/ Anne W. Lyddane
Deputy Clerk

By direction of
Judge F. DICKINSON LETTS

---

425 [Filed June 17, 1957]

ORDER OVERRULING MOTION FOR NEW TRIAL

Upon the coming on for hearing of the motion filed herein by the plaintiff, for a new trial, it is this 17th day of June, 1957, ordered that said motion be, and the same is hereby overruled.

Harry M. Hull, Clerk,
By /s/ Anne W. Lyddane
Deputy Clerk

By direction of
Judge F. Dickinson Letts

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426 [Filed July 2, 1957]

NOTICE OF APPEAL

Notice is hereby given this day of , 1957, that PHYLLIS NIELSEN hereby appeals to the United States Court of Appeals for the District of Columbia from the judgments of this Court entered on the 15th & 20th days of May and June 17, 1957 in favor of Sidney Z. Mensh, t/a Sidney Z. Mensh & Company, and Barclay Corporation, against said Phyllis Nielsen, plaintiff.

/s/ Harry W. Goldberg
Attorney for Plaintiff

* * *

The Clerk will please mail a copy to Counsel for Defendant.
O'Donoghue & O'Donoghue

Plaintiff's Ex. 11

BEST COPY AVAILABLE

from the original bound volume

Plaintiff's Exhibit No. 14

Form 601--CPB No. A 28810

CERTIFICATE OF OCCUPANCY

[Pl's. Ex. 14 for Id.] Washington, D.C., Nov. 2, 1954

Permission is hereby granted to BARCLAY CORP. to use the BASE., 1st, 2nd & 3rd floor(s) of the building located on Lot 1297 Square 1301 known as premises 2610 Tunlaw Rd., N.W. for the following purpose(s): APARTMENT HOUSE.

ZONE RES 40 A FEE $4.00

* * * *

Superintendent of Permits, D. C.

By /s/ F. W. Hester
Permit Clerk.

Plaintiff's Exhibit No. 19

352 "Article 602-03 Subsection E (2) of the Building Code of the District of Columbia.

"(e) Emergency lights shall be arranged and controlled to provide illumination from sunset to sunrise in buildings used or occupied at night, during the period of occupancy, and in all occupied buildings at other times when daylight does not provide sufficient illumination, as follows:

"(2) Exit corridors, public corridors, windows or doors leading to exit and outside exit areas.

"There shall be an emergency white light over all required
353 exit doors on the outside of the building, except where determined by the Director of Inspection that adequate public street lighting is present."

That regulation was in effect on February 26, 1954.

Plaintiff's Exhibit No. 20

353 "Article 603-02, Subsection i.

"Residential Buildings.

"i. Emergency lighting and protective appliances. All residential buildings three or more stories in height shall be equipped with emergency lighting, except the following:

"1. A building not more than three stories in height used solely as an apartment house or tenement house or a combination thereof, and having but one apartment or tenement per floor, and no additional rooms."

That section was likewise in effect on February 26, 1954.

[Filed Oct. 14, 1957]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Wednesday, May 15, 1957

The trial of the above-entitled action was resumed before the Honorable F. DICKINSON LETTS, United States District Judge, and a jury, * * *

* * * * * * *

2 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. GOLDBERG: * * * The scene of the accident, ladies

3 and gentlemen, the scene of the play, shall we say, is 2610 Tunlaw Road, Northwest.

* * * * * * *

4 It is not necessary, ladies and gentlemen, that we prove everything because certain things are admitted. It is admitted that the defendant Barclay Corporation and Sidney Z. Mensh Company were the owners and respective managers of this particular development.

It is admitted that Mrs. Nielson was a guest of a tenant.

* * * * * * *

6 And the evidence will further show, ladies and gentlemen of the jury, that under the District of Columbia regulations then and there in effect, both the electrical regulations and the building regulations, this apartment was obliged under the law to have an outside light over that doorway.

* * * * * *

11 Now, ladies and gentlemen, we will show you prior to presenting evidence of disability that there is liability. We will show you that as the guest of a tenant the owner of this building, the Barclay Corporation, and the manager of the real estate and the operator, the Sidney Z. Mensh Company, owed a duty to maintain this building in first-class condition for the use of tenants and their guests.

We will show you that they failed to comply with the District of Columbia regulations which were imposed upon them to maintain an outside light.

12 We will showyou that through the absence of this light and the bizarre, strange, and unorthodox construction of this front which consisted of a door which opened from the center to the left, and which incidentally a right handed person could not have used except by standing in an awkward position, and by the presence of this solid slab of unidentified glass running from the floor to the ceiling, that the absence of light required by law, and the presence of this slab which was deceptive in its very nature, those two factors combine to cause this woman, using the area carefully and prudently, to sustain this severe and this unfortunately, we are advised, permanent injury.

* * * * * *

PHYLLIS C. NIELSON

24 the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

26 * * * * * *

Q. Mrs. Neilson, we are inquiring today with regard to an accident

which occurred on or about the 26th day of February, 1954. Do you recall being involved in an accident on that occasion? A. Yes, sir.

Q. Can you tell us where this accident took place? A. It took place in the entranceway to an apartment at 2610 Tunlaw Road.

* * * * * *

Q. And who was with you when you went to the building on that particular occasion? A. Mr. Howard Tanner and John Neilson.

* * * * * *

27 Q. Mrs. Neilson, can you tell us, please, whether you had ever been in this building before prior to the date of the accident? A. Had I been in the building?

Q. Yes. A. Yes, sir. I had been in it once.

* * * * * *

28 Q. On that particular occasion have you any idea what time of day you got there? A. I am not sure of the time, sir; I know it was in the afternoon.

Q. Did you go into the apartment on one occasion or more than one occasion on that day? A. I went in once.

Q. And when you went in do you recall how you came in to the apartment? A. Yes, sir. We were carrying boxes and somebody
29 held the door open for me.

* * * * * *

Q. And how did you leave the building, if you recall? A. Well, the four of us all went out together.

Q. Have you any recollection of opening the door to leave on that occasion? A. No, sir, I didn't. One of the boys opened it.

* * * * * *

30 Q. Had you ever gone in the area prior to the date that you went there on February 22nd? A. Yes, sir, I had been in the area.

Q. Tell us about that, if you will. A. Well, I was there at the drugstore and Mr. Tanner asked me if I wouldn't go with him to look at an apartment and give a woman's view on it, and I said yes, I would, and we went over there and we met a woman over there in another apartment,

Mrs. Lakeman.

Q. Who was Mrs. Lakeman? A. The resident manager.

Q. Was that in another apartment building? A. Yes, sir. It was not the same building, and she couldn't take us in the front, she said they had laid cement, and she said she might be able to get in the back, and she took us around to the rear and we couldn't get in there because the building was locked.

Q. Were you able to approach the front of the building on that date? A. No, sir.

Q. Did you see the front entrance on that date? A. No, sir.

31 * * * * * *

Q. You were a friend of theirs at that time? A. Yes, sir.

Q. Mrs. Neilson, about what time of the evening was it that you arrived at this apartment on the evening of February 26, if you remember? A. I would say it was around 6:30.

Q. And what was the condition of darkness at that time on the streets? A. On the streets?

Q. Yes. A. Well --

Q. Was it light or was it dark? A. No, sir, it was dark.

* * * * * *

32 Q. And when you got to the apartment do you recall where you parked? A. Well, first he parked on the street and then he said, I can get down in further, so we went down in closer to the door between the two apartment buildings and parked the car there.

Q. And when the car was parked what then happened? A. Well, almost the minute that he stopped Mr. Neilson got out and I started to get out, and Mr. Tanner said, would you take the key and open the door for us so we can get the stuff in? And he got out and he reached in and

33 got the key.

Q. Who gave you the key? A. Mr. Tanner. He was still in the driver's seat. As he and I walked toward the entrance I heard footsteps and I just saw a form go in; somebody was going up the steps into the entrance.

Q. Where were you when you testified you started toward the entrance and saw that? A. I was right by the door of the car.

Q. And then after obtaining the key from Mr. Tanner, what did you then do? A. I walked down the walk and started toward the entrance.

Q. Does that walk run parallel with the building? A. Yes, sir.

Q. Mrs. Neilson, tell us what happened after you started to walk toward the building? A. Well, I started walking toward the stairs and then when I got to the steps I turned right and I saw what to me appeared to be an open doorway and I started -- there was absolutely no obstruction or anything; it looked just like an open doorway -- and I started up the steps and started to step into what I thought was an opening, and something hit me in the face.

Q. As you approached and stepped into the entrance do you recall
34 whether there was any outside light over the doorway? A. No, sir. Outside it was quite dark, but there was a dim light coming -- I couldn't see a light, but there was a dim light in the stair well.

Q. What was the condition of the area of the entrance? Was that light or was it dark? A. It was dim.

* * * * * *

36 Q. And who was the resident manager that you met? A. I later found out that her name was Mrs. Lakeman.

Q. Was the lady who came to you while you were lying stricken at the scene the same lady whom you met on the occasion that you went there with Mr. Tanner and was introduced to her as the resident manager? A. Yes, sir, that was the same lady.

* * * * * *

37 Q. And did any conversation take place between you and Mrs. Lakeman? A. Yes, sir.

38 Q. Did you advise her what had happened? A. She --

MR. O'DONOGHUE: I object.

THE COURT: Sustained.

MR. GOLDBERG: Do I understand Your Honor is excluding any

testimony as to what Mrs. Neilson told the representative?

THE COURT: Yes.

* * * * * *

BY MR. GOLDBERG:

Q. Did you explain to Mrs. Lakeman what had caused you to have this accident?

MR. O'DONOGHUE: I still object.

39 MR. GOLDBERG: Your Honor, I am not asking her what she said; I am simply asking her whether she told her about it.

THE COURT: Objection sustained.

* * * * * *

41 BY MR. GOLDBERG:

Q. Mrs. Neilson, when Mrs. Lakeman came to the scene of the accident and saw you lying there did she utter any type of exclamation? A. Yes, sir.

THE COURT: Wait a minute; you must wait.

MR. O'DONOGHUE: I object, Your Honor.

THE COURT: Objection sustained.

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42 Q. And where were you taken by ambulance? A. I was taken to Emergency Hospital.

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43 Q. And when Dr. Radice came to the hospital can you tell us what if anything he did for you? A. He set the arm and put me in a, I guess you would call it, a half-body cast. All this was encased except just for my right arm.

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Q. And how long, Mrs. Neilson, did you remain in the hospital, approximately? A. I would say approximately eight or nine days.

* * * * * *

63 Q. Can you explain how your nose was injured in the accident? A. When I hit the glass my face went on the glass.

Q. You refer to the glass that you struck in walking toward the entrance? A. Yes, sir.

Q. Incidentally, in that regard, Mrs. Neilson, as you approached the building and walked to the entrance can you tell us whether you bore to the right or to the left as you approached the entrance? A. As I approached the entrance, to the right.

Q. And was the building on your right as you approached it? A. Well, the walk follows along the outside of the building to the left of the building, but the entrance side is to your right when you turn off of the walk, and I went up the stairs and turned to my right and I went in what I thought was going to be a right-hand open door.

* * * * * *

95 CROSS EXAMINATION

BY MR. O'DONOGHUE:

Q. Mrs. Nielson, do you remember the date when you first went to this apartment house on Tunlaw Road? A. No, sir, I don't remember the date of the first visit there. You mean in the vicinity or the time I had been in the apartment?

Q. I mean the first time you went and tried to get in and were not able to get in? A. No, sir, I don't remember that exactly.

Q. Can you tell us approximately when it was? A. No, sir, I can't give you approximately. It could very well have been one week, it could have been one month. I have no idea because I didn't pay any

96 attention.

Q. Work was going on at that time in the construction of the apartment? A. The first time I was there, yes, sir.

* * * * * *

Q. Had Mr. Tanner moved in yet on the date of the accident? A. On the date of the accident? It was my opinion that they were moving in that night. That is what I thought. I don't know.

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97 Q. The first time you actually went in to the apartment house, you used the same entrance as you tried to use on the night of the accident,

is that so? A. Yes, sir. I didn't pay any attention. Somebody held
98 the door for me. I just walked in.

THE COURT: You just answer his question.

THE WITNESS: The same entranceway?

BY MR. O'DONOGHUE:

Q. Yes. A. Yes, sir.

Q. And you came out that same way? A. Yes, sir.

Q. Now, you were moving things in that afternoon, were you not? A. I just went in once, sir. I took a box of pots and pans. The others were moving things in, yes. My daughter and the boys were moving things in, but I didn't move anything.

Q. You stayed in the apartment the whole time? A. I stayed in the apartment; yes, sir.

Q. Did that entranceway seem to be complete at the time you went through it? A. Sir, I paid no attention to it. I had a big box in my hand and I walked through. Somebody held the door open. I couldn't tell you anything about the entranceway. I paid no attention to it.

99 Q. You say there is a sort of a slab of concrete at the entrance, that step outside of the door? A. Yes, sir.

Q. How big is that, would you say? A. I am not good at measurements, sir. I could not give you any idea.

Q. Well, could you give us any idea based on anything in this room? A. I haven't been near it, sir. I don't know. It is my impression it is not too big; I don't know.

Q. Is it more than a simple step? A. From what I remember there was a step or two, and then sort of a little porch like, or a little slab, or whatever you want to call it, and then another step up going into the door.

Q. How big was the little porch? A. I am sorry, sir, I could not--I am not good at measurements. I could not give you a measurement on it.

Q. Do you know how many steps there were up to the little porch? A. I have seen it since, sir, and I would say there are two.

Q. Two? A. Yes, sir.

100 Q. Then how far does the walk run before it turns? A. I don't know, sir, in measurements. It is about the distance I would say of an apartment with several rooms in it. I would say it was about the distance of a full length of an apartment.

Q. That is, the walk that runs parallel to the building? A. Yes, sir.

Q. Now, on the night of the accident you say you parked the car, or Mr. Tanner parked the car between the buildings? A. Yes, sir.

Q. And was that down toward the end of that walk? A. I would say it was closer, yes, down towards the end. I would say it was closer to the road than it was actually to the door.

Q. Could you see that entranceway from the car? A. You could not see the door, no. You could see --

Q. What could you see? A. Do you mean during daylight or at night?

Q. Well, during daylight; could you see the entranceway? A. In daylight I would say that you could see it very plainly, yes, sir.

Q. And so when you parked your car, if it had been light, you

101 could have seen it? A. Yes, sir, I would say so.

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Q. Were you able to see the entranceway that night when you parked the car? A. I don't know whether I could say I could see it or not, sir. I know that I saw a form going in the entranceway, but I would say, no, that I could not see the entranceway. If you want a yes or no, I would say no.

Q. Why couldn't you? A. Because, I would say because there

102 were no lights out.

Q. Were there any outside lights? A. No, sir.

Q. Were there any lights from the apartment building shining outside? A. I saw none, sir; no.

Q. Were there any street lights that illuminated this area? A. No, sir, I didn't see any.

Q. And it was entirely dark by this time of evening? A. Yes, sir.

Q. So then the whole walk that you walked along was entirely dark, is that true? A. I wouldn't say that, sir. I have lived in the country a lot, and often I have seen roadways and the same in the city, no matter how dark it is, there is enough contrast that you can make out to walk. And regardless of how dark it was, I was able to see the light streak of the walk.

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103 Q. Now, could you see the entrance doorway at all? A. Well, where do you mean? When I got up to it?

Q. Well, before you got up to it? A. No, I could not see the entrance doorway before I got up to it.

Q. Could you see it when you got up to it? A. When I got up to it, yes, when I turned right and looked up.

Q. Well, what was lighting it? A. What was it lighting?

Q. What was lighting it that enabled you to see it? A. This I don't know, sir. There is a very dim, you might call glow. There was a very, very dim light.

Q. Now, this figure that you say was there, where was that? Did you see anybody? A. I can't say that I saw them, sir. I saw a form and it would be very difficult to say. Yes, I saw them. I saw a form. I could not tell you if it was a man or a woman, and I heard the steps along with it.

Q. Did you see the form in the doorway? A. I saw a form move and I heard the steps.

Q. Beg your pardon? A. I saw the form go in the entrance,
104 yes, and I heard the steps. I might say it was a sort of an outline.

Q. You saw the silhouette; you saw it silhouetted then, right? A. I can't say that it was silhouetted, sir. I am trying to give you the best description I can. I just saw a flash or a form go by, and that is all. It is a very difficult thing to describe.

Q. What do you mean by "go by"? Did it pass you? A. No, go in the entrance. No, sir, they did not come past me. Whoever it was did not walk by me.

Q. Now, do you remember testifying, giving your deposition in my office one day about a year ago? A. Yes, sir.

Q. * * * You were asked:

"Q. You got a faint impression of somebody -- being there"

And you said:

"I heard somebody walking and starting up the steps, you know and as I turned around I got a faint impression of somebody walking in the doorway which I was going to go in."

105 And then you were asked:

"Q. Could you see them?"

And you answered:

"A. No, I would not say that I could see. I got a faint impression of somebody being there."

That is right, is it? A. That is right, sir.

Q. So you could not see them? A. It is very hard to describe something like that. Very difficult.

* * * * * *

MR. O'DONOGHUE: * * * And the next question was:

"Q. Going ahead of you in the door?"

And your answer was:

"Coming in the opposite direction, because they did not come by me. I heard the footsteps. I know somebody was in the

106 vicinity because I heard them."

BY MR. O'DONOGHUE:

Q. Do you remember that question and answer? A. Yes, sir.

* * * * * *

Q. So that is how you knew it, because you heard them? A. Sir, I saw a form, something going in along with the footsteps. I can't think of any better way to describe it to you. I could not tell you if it was a woman; I couldn't tell you if it was a man.

Q. May I ask you this, Mrs. Nielson? A. Yes.

Q. What do you mean by saying it was coming in the opposite direction? A. Because they did not come by me, sir. Whoever it was did not walk by me where I was, up near or towards the end of the building.

So, I would say that they had to come from the opposite direction, or from anywhere, but they did not come by me.

Q. You mean they were coming out of the building? A. No, sir. What I saw was a flash going in, so I take it that then also the footsteps sounded like they do when they were going upstairs.

107 Q. So they were going in the same direction? Is that right? A. No, sir.

Q. Well, I am afraid I do not understand you. A. In the same direction that I was?

Q. Yes. A. No, sir. I would not say they were going in the same direction. What I heard was a step and then the sound of footsteps, the sound that footsteps going up the steps make, and then I just saw this flash go by.

Q. How far away were they from you? A. I am sorry, sir, I can't give you distance.

Q. How far did it seem? Did it seem to be close by you? A. I am sorry, sir. I can't give the distance. I can't say the distance. No, I would not say they were in my immediate vicinity, no.

Q. Now, do you remember being asked further:

"Q. So you did not see this person although you heard them?"

And you answered:

"A. I heard somebody go in and I got a faint impression of somebody."

A. Yes, sir.

108 Q. "I can't say that I actually--it is just one of those things there. I heard somebody and I got the impression that somebody had gone in the doorway."

A. That is right, sir.

Q. And you were asked:

"Q. Was there any reason why you could not see them?"

And your answer was:

"A. It was very dull."

A. That is right.

Q. "I could not see whether it was a man or woman, but I knew there was somebody there. I just saw a flash go by."

A. That is right.

Q. So it was very dull, was it? A. Yes, sir, it was dark outside.

Q. Was there a light inside? A. There was an extremely dim light.

Q. Inside the doorway? A. Not right above the doorway, no.

Q. Where was it? A. I am sorry, sir, I saw no light bulb. I could not tell you. All I know is that there was a very, very dim light, and that it did show the outline of the glass plane in the door.

109 Q. Would you say that the place was completely dark? A. No, sir. Inside I would not say it was completely dark. Outside, yes, I would say that it was completely dark.

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112 Q. Mrs. Nielson, what came in contact with the panel you say you hit? A. What came in contact?

Q. Yes, that is right. A. The thing that is most vivid to me is my face.

Q. Your face hit it? A. Yes, sir.

Q. And did your arms touch it at all, or your hands? A. Sir, I have no recollection of that. When my face was hit that is the only thing that I have a recollection of. I could not tell you whether my arm hit or anything.

* * * * * *

113 Q. Were you walking fast? A. No, sir. Thank God I was not walking fast.

Q. Now, were you walking slow? A. Sir, I was walking as anybody would under those circumstances, under that lighting. I was not walking as I would out in the street in daylight.

Q. It was very dark? A. I am a cautious person by nature and it would have been my nature to be extremely careful under that lighting system there.

Q. You say it was very dark? A. Sir, outside it was dark, yes.

Q. And you were outside? A. Yes, sir.

Q. So you were proceeding with great caution, were you? A. Naturally, sir, anybody would.

Q. I am not interested in anybody. I am just asking what you did. A. Sir, I was walking in a normal rate that anybody would walk under those lighting conditions.

THE COURT: Just answer his questions.

THE WITNESS: A normal rate that I would walk under the darkness there, yes, sir.

114 BY MR. O'DONOGHUE:

Q. Would you say you were groping along? A. No, sir, I was not groping along.

Q. Were you putting your foot forward to feel your way? A. I didn't need to, sir. The outline of the walk was there.

Q. Were you putting your hands forward to feel the way? A. No, sir. That was not necessary.

Q. Now, did you hit this thing pretty hard? A. No, sir. All I know is that I walked up the stairs at a normal rate and the next thing I knew my face is stopped dead.

Q. You walk across this little porch, did you? A. It was a step, a step or two.

Q. A step across, did you say? A. I don't know how many steps, sir. I know that I walked in, didn't walk very long. I don't know how many steps it was. It may have been one step or maybe two.

Q. Did you lose consciousness? A. Sir, I was either stunned or I lost consciousness. I don't know which.

Q. Well, was there any--do you remember going down, falling down? A. No, sir.

115 Q. What is the last thing you remember? A. Just this sort of, like flash, on my face; this pain in my face. That is all I remember.

Q. And then what is the next thing you remember? A. The next thing I remember opening my eyes and seeing the people around me, seeing Tanner and Mr. Nielson.

Q. And where were you at that time? A. I was on the sidewalk. I think my foot was touching the stair there.

Q. Your foot was touching the stair? A. Yes, sir.

Q. Well-- A. I was straight out from the steps.

Q. You mean your head was far out from the steps or your feet? A. No, my foot was touching the step.

Q. And where was your head? A. Straight back.

Q. So you bounced off of that panel, across the porch, down two steps, and your head was down the sidewalk when you regained consciousness, is that it? A. I don't know if I bounced, sir. I don't have any idea. I could have stepped back off of there. I don't know.

116 Q. Well, you have no consciousness of anything in that intervening period, is that it? A. No, sir.

* * * * * *

142 JOHN B. NIELSON

was called as a witness by counsel for the Plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERG:

* * * * * *

144 Q. Can you tell us how tall the building was from the story standpoint? A. It was a 3-story building, and there was also a basement or so-called terrace level, actually 4 stories of apartments.

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Q. Did the building face the street? A. No, it did not. It was perpendicular to the street. There was an end facing on the street

but the front side of the building was actually perpendicular to the street.

145 Q. Can you tell us how many entrances there were to this premises 2610 Tunlaw Road? A. There were two entrances on opposite sides of the building. One was the proper entrance; the other was a service entrance to a furnace room or storage room, something of the sort.

Q. And as respects this particular building, can you tell us at what particular location the front entrance was located? A. The front entrance was located, as I said, on a long face of the building, perhaps 50 feet off the road proper which was Tunlaw Road.

Q. Would the entrance be at the side or the central or at any particular juncture on the front of the building? A. It was in the center of the side of the building.

Q. Now, was there any particular approach or walkway which led to the front entrance? A. Yes, there was a concrete walk which led from Tunlaw Road half the length of the building, then made a right angle turn into the entranceway to the building.

* * * * * *

146 Q. And can you describe to us the entrance way to this particular building, 2610 Tunlaw Road? A. The entrance way was recessed into this side of the building, perhaps 3 or 4 feet recessed into the building. There was a concrete slab below. Perhaps one step there. Another step into the threshhold up to the threshhold of the building, and there was an overhead slab that came out to the--as far as the wall of the building.

Q. Was this slab, shall we say, equivalent in size to the slab on which you stepped, before stepping onto the threshhold? A. Yes, sir, exactly.

Q. And both of them came out to the front of the building? A. Yes, sir.

Q. Can you describe the entrance proper? A. The entrance proper was mainly of glass. On the lefthand side was the door. This door rather peculiarly opened from the center to the lefthand side.

It opened outward. And to the right of this door was a solid pane of glass from the floor to the ceiling, clean and clear, and no

obstructions whatsoever.

* * * * * *

147 Q. Do we understand there were no markings on this glass pane at all? A. No, sir, none at all.

Q. Was there any border, or metal-type border at the bottom? A. No, sir.

Q. That is to say, rail or kick plate? A. No, there was none.

Q. Was there any grille work across the front of it? A. No.

Q. Was there any grille work visible on the other side, on the inside surface? A. No, there was none.

Q. Was there any kind of decorative or other metal work on this glass window in any fashion? A. No, none at all.

* * * * * *

155 Q. * * * Now, Mr. Nielsen, I believe you indicated that this apartment at 2610 Tunlaw Road, Northwest, did not face on Tunlaw Road, is that correct? A. Yes, sir.

156 Q. How was the apartment located as respects Tunlaw Road? A. It was a long building. It was perpendicular to the road, that is one end, the narrow end of the building faced on to the street.

Q. And did the building run back from the street? A. Yes, sir.

Q. And what was there at the back of the building, if anything, the end opposite the street side? A. On the other narrow end, facing on to a court, there was a parking lot.

Q. I believe you indicated that this was one of a group of apartments? A. Yes.

Q. And was this parking lot in the center of the group of apartments? A. Yes. It served all apartments in the development.

Q. Now, sir, can you tell us as respects street lighting on Tunlaw Road in front of, or adjacent to the building, adjacent to 2610, what was the condition of the street lighting? A. There was no street lighting which shone between the two buildings which in any way illuminated the space between the two buildings.

Q. You say the space between the two buildings. Was there

another building opposite 2610? A. Yes, sir, there was another
157 building opposite 2610, same configuration, parallel to the building separated by a distance of perhaps 40 or 50 feet.

Q. And what was between the two buildings? A. At the time there was nothing but mud in between. Later a lawn was laid between the two buildings.

Q. Now, were there any lamp posts of any type on the building that furnished lighting in the area between the two buildings? A. No, sir, none whatsoever.

* * * * * *

182 Q. * * * Now, I questioned you with regard to the street lighting, I believe, and you have testified that this apartment was set back vertically from the street with the entrance on a court. A. Yes.

Q. Was there any street lighting directly in front of -- and when I say in front I am referring to the court, but was there any street light at the Tunlaw Road side of the building which would have been in line with the building? A. No, sir, not just at the end of the building. There were a few lights on Tunlaw Road but none in that particular location.

Q. Was there any light located at Tunlaw Road which would have been in the area opposite the court which was between the building -- A. No, sir.

* * * * * *

Q. * * * Well, now, in any case, bearing in mind that we are discussing at the moment 2610 Tunlaw Road, which sets in a court which runs perpendicular to the street, can you tell us your best recollection if you were standing at the court, in the center of the court on Tunlaw Road which would be between the two buildings, whether there
183 was any street light on that side of the street at all that you can remember? A. No, sir, there was none there.

Q. Then I understand that there was no street light on the side of the street on which this building is located? A. That is right, sir.

Q. Now, do you have any recollection, sir, whether there was

any street lighting across the street on the other side of Tunlaw Road, which would be the side of the street opposite the side on which this apartment was located? A. There were no street lights at all. This was the back of the hospital. There may have been a light in the hospital but no street lights whatsoever.

Q. Then do we understand from your testimony that there were no street lights on Tunlaw Road on the side of the street on which this apartment is located on the 26th of February, 1954? A. That is correct.

Q. Do we further understand that it is your recollection that there were no lights at the time on the opposite side of the street on which this building was located? A. That is also correct.

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184 Q. And that there is court about 75 feet wide separating this building from the other building? A. I think it was about 45 to 50 feet.

Q. I believe you testified that there was no light in the court? A. That is right.

Q. I will ask you, was there any sort of lights strung over the court in the form of bulbs? A. No.

Q. Were there any lights on poles coming out the front of that court? A. No.

Q. Were there any lights of the type that the City uses with large globes on them in the court? A. No, none at all.

Q. When you go to the back of this building, back of the court, do we understand the parking lot begins back there? A. The parking lot begins at the far end of the building.

Q. And that parking lot runs back how far? A. At a crude guess it is about a 150 feet, and it is square.

Q. Then there is a square of 150 feet for parking? A. Yes.

Q. Now, what is at the opposite end of the parking lot? A. Other buildings of the same development.

185 Q. Can you tell us, whether there is any light located, when I say light, whether there are any stationary installations or lights

located on the parking lot? A. No, there are none.

Q. Then do we understand the parking lot has no permanent electrical illumination of any kind except the headlights of the cars there? A. That is right.

Q. I am now addressing my inquiry to the walk. I invite your attention to this photograph which is Plaintiff's Exhibit 11, and I believe you have identified this as being an accurate portrayal of the walk leading up to the entrance of 2610 Tunlaw Road on the occasion of this accident, is that correct? A. Yes, sir.

Q. All right, sir. Now, are there any lights, or were there any lights located on the walk from the curb back to the entrance way to 2610 Tunlaw Road on the date of this accident? A. No, there were not.

Q. Were there any lights running along the ground such tiny, small illuminating lights which sometimes light up walkways and steps? A. Absolutely not.

Q. Were there any posts, poles, or any other permanent type of fixed illumination from that walkway back from the street to the
186 building entrance? A. No, there were not.

Q. Was there any light on the outside of the building at all on that day? A. No, there was not.

Q. You have indicated that there was an overhang? A. Yes.

Q. And I believe you stated that that overhang went up to the front of the building? A. Yes.

Q. Now, directing your attention to the overhang was there any electrical fixture in that overhang? A. No, there was not.

Q. Was there anything in the overhang which would indicate a receptacle for an electrical bulb or for an electrical fixture? A. No, sir, not at that time.

Q. Was there any type of wiring, electrical fixtures, electrical bulbs or any other type of illumination present on the day of the accident? A. No, sir.

Q. Was there any evidence that work was being done to install

lighting, or that was in progress to install lighting on the date that this accident occurred? A. No, sir.

187 Q. Now, Mr. Nielsen, I want to question you for a moment again about this door, the entrance way shall we say. I believe you testified the entrance way consists of a door and a glass panel. A. Yes, sir.

* * * * * *

189 Q. Insofar as the width of the panel was concerned, can you tell us whether the width of the panel was equivalent to the width of the door, or whether the door was larger than the panel, or can you identify that? A. I think they were of equal size. I think that there was a central post between, that it was absolutely in the center.

* * * * * *

190 Q. Was there anything at all, sir -- I won't belabor this, Your Honor, because I am in a little doubt about it -- but was there anything at all, sir, on the panel of the glass to in any way identify it as such? A. There was nothing on the glass, nothing behind it, nothing in front of it, nothing on it.

Q. Now, this slab which was immediately in front of the door and the panel, have you any idea, sir, how deep that slab was, that is to say, after stepping up on that step how deep was the slab from the front to the entrance? A. I am not absolutely certain; I suppose about three feet.

* * * * * *

196 Q. Now, sir, did Mrs. Lakenan at that time tell you when the apartment would be available? A. Yes, she did.

Q. And what were you advised? A. I asked if it would be possible to move into this apartment over the George Washington Birthday holiday weekend. This was a three-day weekend and I wanted to use this opportunity to move my stuff without being required to take time off from work, and when I asked Mrs. Lakenan about this she said it would be perfectly all right to move in. I think she said any time after the 15th. A. After the 15th of what?

Q. The 15th of February. As a result of your visit and

inspection, do you know whether Mr. Tanner arranged to take the apartment? A. Yes, sir, I do. He signed the lease, and some time before this three-day holiday weekend in which we moved into the apartment, he gave me a key.

Q. And may I ask you this: Did you undertake to begin moving in over the George Washington Birthday weekend? A. Yes, sir, I did.

Q. Now, can you tell us whether at that time there were any occupants already in the building? A. Yes, sir, there were. There were
197 maybe, oh, as many as half a dozen families in the building. I think the Lakenans had moved in.

Q. Were the Lakenans already there when you started to move in the 22nd of February weekend? A. Yes, they were there, and I also recall clearly a Chinese family that were living in the building.

* * * * * *

Q. Mr. Nielsen, at the time that you went to examine the building the first time with Mr. Tanner, did you notice whether there were any signs on the building of any kind? A. There were "open" signs as one sees in most apartments that are open for rent.

* * * * * *

198 Q. To your personal knowledge had she been there with anyone else in the premises of 2610 Tunlaw Road prior to the weekend of February 22nd? A. I learned since that she attempted on one occasion to examine the premises in the company of Mr. Howard Tanner but because of a wet cement walk in front they were unable to gain access to the premises.

Q. Now, do you recall, sir, Mrs. Nielsen going to the building on one occasion over the weekend of February 22, 1954? A. Yes, I do.

Q. And who was present on the occasion that she went there?
199 A. Mrs. Nielsen, her daughter, myself and Mr. Howard Tanner.

Q. Do you recall what day of the week this may have been?
A. It was some time over that three-day holiday weekend. Well, it

could have been any one of the three days.

Q. Now, do you recall the occasion for Mrs. Nielsen and her daughter to have been there on that particular day? A. Yes, sir. I was moving my furniture and personal belongings from the Berkshire Apartment to these premises, and during the same weekend Mr. Tanner was moving some belongings of his, too. On this particular occasion that she was there, I recall she assisted in taking some of the kitchen ware, breakables, and things of that sort, and when we came to these premises at 2610 Tunlaw Road she and her daughter were insisting that they unpack these particular breakables, and whatnot, while Mr. Tanner and I were moving the heavy stuff into the premises.

Q. Now, Mr. Nielsen, have you any idea what time of day or night you arrived with Mrs. Nielsen on this particular day that she came there for the first time? A. This was during the day time.

Q. During daylight hours? A. Yes, sir.

200 Q. And have you any recollection, sir, as to how she gain entrance to the front, or whatever entrance she used on that particular day? A. I think, well I am sure that on this occasion we held the door for her. This was her first time to actually see the apartment, she didn't know where it was, exactly, and we held the door for her and she and her daughter entered in that manner.

Q. Do you have any recollection as to whether she was carrying anything on that occasion? A. I think she was carrying some of the bundles, and whatnot, that were moved from my place.

* * * * * *

201 Q. Did you and Mr. Tanner and Mrs. Nielsen and her daughter then leave the apartment? A. Yes.

Q. Was it still daylight when you left? A. Yes.

Q. And did you leave through the same door through which you had originally entered the building? A. Yes, sir.

* * * * * *

202 Q. Now incidentally, Mr. Nielsen, with regard to the interior lighting, as you enter the building, as you passed the front door and

entered into the vestibule as you call it, which takes you up to the first floor and down to the terrace level, is there any lighting fixture inside the door as you enter? A. I don't know if there is now, but there was none then in the vestibule.

Q. I am referring to this (indicating). Was there any lighting fixture inside as you enter? A. No, sir.

* * * * * *

203 Q. Do you know whether Mrs. Lakenan, the resident manager, was aware that you were moving in your things, and Mr. Tanner was moving in his things, on the occasion you were there over the 22nd weekend? A. Yes, I think so.

* * * * * *

204 Q. Now, when you arrived at the premises, was that in the day time or the evening? A. It was in the evening. We had accomplished all of this after working hours. I had left the office about a quarter of 5 or 5, as I normally do, and we had driven from the premises, rented a trailer, returned to the premises, loaded the trailer and then driven this distance over to Tunlaw Road, Northwest.

* * * * * *

205 Q. Now, so far as you are aware had Mrs. Nielsen been back to the premises between the February 22nd weekend, when you have stated she was there with her daughter, and the evening of this accident.
A. No, sir, she wasn't there to my knowledge. She was attending school at the time.

* * * * * *

Q. Now, when you were driving Mr. Tanner's home in Alexandria here, can you tell us where you stopped the car, where the car was stopped? A. Yes, sir. We were off the street, perpendicular to the street, headed in in this space between the two buildings that I described this morning.

Q. Was there any curbing out on the street at that time? A. I don't think so. I think it was possible to just drive directly into this
206 opening which had no lawn on it, and there was no objection to this

moving and parking at that time.

* * * * * *

Q. Bearing in mind if you will that you were in the middle of the block, and were at the court, can you tell us how far to your right there would have been a street illumination on that place in feet? A. Not exactly. Perhaps a hundred feet down the street, seventy-five to a hundred feet down the street beyond the building there would have been a light; there would have been another 75 to 100 feet on the other side of
207 the building.

Q. Did that light, or did those lights, either the one to the right or the one to the left, afford any illumination to the area in which your car was parked? A. No, sir, I don't believe so because the building would have created shadows.

Q. Now, aside from these lights which were 75 to 100 feet in either direction, was there any other illumination in or near the premises on this particular evening? A. No, sir, I don't believe there was.

* * * * * *

Q. And when you got out of the automobile, and Mrs. Nielsen got out, what then occurred? A. I turned I believe, to the trailer where I was going to remove some goods with the assistance of Mr. Tanner, I was really sort of waiting for Mr. Tanner. Mrs. Tanner had handed Mrs. Nielsen the key to the apartment and had asked her to open the door so we might enter with our loads.

208 Q. Did you hear him so request? A. Yes.

Q. At that time? Did you see him hand the key?

A. I don't recall, but he asked her to open the door. I imagine he handed her the key.

* * * * * *

210 Q. * * * Now, sir, continue from that point, when Mrs. Nielsen got out of the automobile can you tell us what then took place? A. She proceeded to the entrance of these premises at 2610 Tunlaw Road.

Q. And by what means, if you recall, did she proceed to the entrance? A. She walked to the entrance.

Q. Now, did there come a time after she had undertaken to walk to the entrance that you noticed anything unusual occur.

211 A. No, sir, not while she was walking.

Q. Did she ultimately disappear out of your view as she was walking? A. Yes, after making this right-angle turn in that doorway, I saw her body disappear behind the edge of the building.

Q. Did you notice anything thereafter? A. The next thing I saw was her body falling out of the doorway on to the pavement immediately in front the steps.

Q. Now, can you recall the manner in which she fell? A. Not precisely, she fell.

Q. Can you tell us where her body landed ultimately when it came to rest? A. It landed immediately in front of the steps with her head facing outward and her feet at the foot of the steps.

Q. Did she move after she fell, do you remember? A. No, sir.

* * * * * *

214 Q. Mr. Nielsen, you indicated that Mrs. Lakenan, you pictured
215 it as flying out of the building. What was her demeanor when she came to the scene where Mrs. Nielsen was lying on the ground? A. She was very excited that an accident had occurred before her building.

Q. Now, when Mrs. Nielsen spoke to Mrs. Lakenan, did Mrs. Lakenan make any immediate remark to Mrs. Nielsen? A. Yes, sir.

Q. And what did she say there at that time?

MR. O'DONOGHUE: I object to the question.

THE COURT: The objection is sustained.

MR. GOLDBERG: Your Honor, I asked that question and request a response as part of the res gestae, as a spontaneous occurrence raised at the scene of the incident.

THE COURT: The objection is sustained.

* * * * * *

217 Q. Did you observe the condition of the light or darkness in the entranceway on the evening at the time Mrs. Nielsen suffered her accident?

A. Yes, I did.

Q. Can you tell us what the condition of the lighting at that time? A. There was, as I have indicated previously, no lights on the overhang outside the building, no light outside the building, and there were no lights in the vestibule immediately inside the entranceway. The only lights in this area in the building that was observable in any way was the light on the first floor landing which was not in direct line with the outside entrance.

Q. Well, was such a light, was a bulb or fixture visible from the outside entrance of this building? A. No bulb was visible. It was not in direct line with the entranceway. You could, however, looking through the glass entrance you could see that there was a light on the first floor landing.

Q. What was the general condition of the light or darkness in the area of the entranceway at the time Mrs. Nielsen fell? A. It was very dim.

218 Q. Now, you have indicated that there was no light on the overhang. Was there any light to be seen on either side of the entranceway near the entranceway? A. No, sir.

Q. Was there any light whatever in the entranceway or on the outside of the building in that area? A. No, sir, none.

Q. Now, did you observe, Mr. Nielsen, the point at which Mrs. Nielsen had come in contact with the front of the entranceway? A. I did.

Q. And can you tell us what identified that particular point to you? A. In the center of the pane of glass on the right there was the impression of a face, that is the forehead and the chin, and a pushed up impression of a nose. You could actually make out the nostrils.

Q. When did you observe that? A. We observed that, I believe, soon after the accident when we were looking around the area to see what could have happened.

Q. Did you observe it on any subsequent occasion? A. Yes. That impression remained on the glass for a day or two after the accident.

Q. Did you see it during the day time? A. Yes.

219 Q. And in respect to its location on the pane of glass, can you tell us whether it was located on the side or in the center? A. It was approximately in the center at about Mrs. Nielsen's height.

* * * * * *

Q. When was the first time, Mr. Nielsen, that you realized that there was no outside lighting fixture over this entrance? A. On the night of the accident.

* * * * * *

221 Q. Now, Mr. Nielsen, you have testified that you noticed Mrs. Nielsen walk away up the walk as she approached the building. Were you able to see her distinctly as she walked toward the building?

A. I saw her as she was leaving the car, and I saw at least the silhouette of her outline in the doorway.

Q. What was the condition of the light on that walkway between the car and the door? A. It was -- well, it was dark, or very dim. I don't know of any lights that illuminated it.

Q. You have testified previously, I believe, that there was no lighting in the court? A. That is right.

* * * * * *

230 Q. Now, can you tell us how many of the mail boxes appeared to have names on them at the time you began moving in over the George Washington Birthday weekend? A. There were maybe three, four or five names on the boxes, on the mail box front.

Q. And you saw people coming and going and coming on this particular weekend? A. Yes, sir.

* * * * * *

232 CROSS EXAMINATION

BY MR. O'DONOGHUE:

Q. When did you say you first went to this apartment building?

A. I think it was some time around the first of February, either shortly before or shortly after.

Q. And did you go in and examine the building at that time?

A. I remember gaining access to the apartment which we later acquired, yes, sir.

Q. Was it finished at that time? A. As nearly as I can recollect, it was. Maybe it wasn't cleaned up. It had only been constructed if it was finished.

233 Q. This whole apartment building was newly constructed?

A. Yes.

* * * * * *

Q. Was the building occupied at all at that time? A. I don't recall. I don't think so.

* * * * * *

238 Q. Had Mr. Tanner moved into the apartment at the time of this accident? A. I think he had, sir. We had certainly moved a lot of

239 his belongings into the apartment over the preceding weekend.

* * * * * *

Q. Did you spend a couple of nights prior to the accident? A. Yes, sir.

Q. Then you had, in fact, moved in? A. Yes.

* * * * * *

Q. Did the structural conditions remain exactly the same during the whole period from the time you moved in to the time of this accident?

240 A. As far as I can recall, yes, sir.

Q. The lighting and light fixtures was perfectly evident to you?

A. I don't recall having taken note of those before this accident.

Q. But they were easily observable, isn't that so? A. It would have been easy to observe had I been looking upward as I entered the entranceway, yes, sir.

* * * * * *

251 RECROSS EXAMINATION

BY MR. O'DONOGHUE:

Q. There were no light fixtures anywhere prior to the night of the accident that were not there the night of the accident, were they?

A. I don't think so, sir.

Q. And yet it was quite dark when you drove up there? A. Yes, sir.

Q. You knew that Mrs. Nielsen was not familiar with the area, did you not? A. Yes, sir.

Q. And that she had never been there before? A. Yes.

Q. And yet you requested her to go ahead and go to the apartment and open it up? A. I didn't ask her, sir.

Q. Mr. Tanner asked her? A. Yes, sir.

Q. And you agreed to that request? A. It wasn't necessary to agree or disagree.

Q. You didn't dissent from it? A. No, sir.

MR. O'DONOGHUE: That is all.

* * * * * *

254 JOHN WILLIAM LEWIS

heretofore called as a witness on behalf of the plaintiff, being recalled and testified further as follows:

DIRECT EXAMINATION

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260 BY MR. GOLDBERG:

* * * * * *

Q. Now, will you please tell me on what date the Building Inspectors approved the electrical installation of those premises, final approval? A. Final approval of the job was given April 5, 1954.

* * * * * *

273 CROSS EXAMINATION

BY MR. O'DONOGHUE:

* * * * * *

A. Well, sir, I worked in the engineering section, electrical engineering section for a number of years, and whenever a man presents a drawing, what you call proposing to build a structure, then we go over all the electrical designs to see whether or not he complies with the regulation, and if there is any question about it, we call in the architect or the engineer to discuss it at that time and disposition is made in the

electrical section by the electrical engineers.

Q. And you don't know what delegation of authority there has been in respect of these regulations, do you? A. No, sir.

Q. You don't know whether any has been made as a matter of fact, do you? A. No, sir.

Q. Let me ask you this: When an application for permit is received the drawings are sent with regard to the electrical portion of it to your office, is that true? A. No, sir, not to my office now. It goes to the Electrical Engineer.

274 Q. To the Electrical Engineer? A. Yes.

Q. And is he under your supervision? A. No, sir.

Q. Well, then, the approval of the application is referred to the Electrical Engineer and not to your office, is that it? A. Yes, that is true.

Q. And if he approves the drawings he sends them on to your office, is that the idea? A. Some of them. A copy is kept in the Central Permit Files permanently, you know, for the duration of maybe three years, something like that, and then we refer to that particular drawing to see that the electrical installation is made according to the approved drawing.

Q. In other words, your office has nothing to do with the application of the regulation except to see that they -- strike that.

If those drawings are approved there is a specification perhaps with the drawings? A. No, sir.

Q. Just a drawing that is clear enough to indicate exactly the type of installation, is that it? A. Generally, yes.

275 Q. That is approved by the Electrical Engineer's Office, is that so? A. Yes, sir.

Q. And not by your office. A. That is right, by the Engineer's office.

Q. And then your offices' function is to see that the work done is in accordance with the plans approved? A. Yes sir.

Q. And that is your sole function? A. Well, no, sir. We have

duties, but in that particular --

Q. I mean with respect of the processing. That is your sole function, to see that the actual construction is in accordance with the plans? A. Yes, sir.

Q. And any objection to it, and so forth, is noted somewhere else, is that right? A. Yes, sir, we wouldn't know about that.

Q. You don't have those records? A. No, sir.

Q. So if there is any question about whether something is amiss with the requirements of the regulations that is thrashed out by that other office, what did you say it was? A. Electrical Engineer's office.

Q. That is thrashed out there? A. Yes, sir.

276 Q. And if any interpretation of the regulation is needed, or any exception to that, or not, that is determined in that office? A. Yes, sir, that is exactly right.

Q. And you don't have those records? A. No.

Q. And, to reiterate, your sole function is to see that the installation complies with the plans as approved in regard to the building construction? A. Yes, sir.

* * * * * *

284 DIRECT EXAMINATION

BY MR. GOLDBERG:

Q. Now, you have indicated that there was a head of the Electrical Engineering Section who might have originally considered the application. Who was that? A. That was Mr. Friede.

Q. Mr. Friede? A. Yes, sir, Mr. H. A. Friede.

Q. Mr. Friede. And is Mr. Friede still head of that department? A. Yes, sir, that section.

Q. And would that be known as the Electrical Engineering Section? A. Yes, sir.

Q. And where is that located, sir? A. In the District Building, Fourteenth and E Street.

Q. And is that on the first floor? A. Yes.

Q. And Mr. H. A. Friede, and he is Director of the Electrical Section? A. No, sir, he is Chief Electrical Engineer, Chief of the Electrical Engineering Section.

Q. And was he Chief Electrical Engineer back in 1954, if you know? A. Yes, sir.

285 Q. And he still is today? A. Yes.

Q. Do you know who his deputy is, chief assistant? A. Sir, he is now a man by the name of Kern, Alfred Kern.

Q. That is Curran? A. Kern, and also Norman Dement.

* * * * * *

294 Q. Now, sir, do we understand that the papers which you have just placed before you represent all of the papers which were in the files of the Central Permit Bureau which pertained to these premises?

295 A. Yes.

Q. Have you looked at those papers? A. Yes.

Q. Can you tell us if anywhere among those papers there is any record of any kind which constitutes an exception to the others of premises 2610 Tunlaw Road with respect to compliance with any electrical regulations? A. No, sir. There is no record of any exception being granted.

* * * * * *

322 Q. Mr. Lewis, with reference to Plaintiff's Exhibit No. 15, which I believe is the record of the action by your department on the application for an electrical permit, that is the record, is it not? A. Yes, sir.

Q. At 2610 Tunlaw Road, Northwest? A. Yes, sir.

* * * * * *

323 Q. Can you tell me, sir, when the next inspection was made after that date? A. 12-4-53.

Q. And can you tell me, sir, when the next following inspection was made by an electrical representative of your office? A. 2-11-54.

Q. And can you tell me when that inspection was made? A. The final inspection was made 4-5-54.

Q. Now, on 4-5-54 was the job approved? A. Yes, sir.

Q. Now, had the job been approved prior to 4-5-54? A. No, sir.

* * * * * *

324 Q. And do we understand from the records of your office that approval of the electrical installation was not made until April 5, 1954? A. April 5, yes, sir.

* * * * * *

329 Q. Mr. Lewis, had the electrical installations at premises 2610 Tunlaw Road, Northwest, according to your records, been completed on the occasion of the next to the last inspection in February, 1954? A. No, sir.

330 Q. As of February, 1954, the incidental work had not been completed? A. That is right, sir.

* * * * * *

334 CROSS EXAMINATION

BY MR. O'DONOGHUE:

Q. Mr. Lewis, when an application is made for a building permit, I believe you told us that it was required at that time that blueprints showing the layout of the building be filed? A. Generally, but also it depends entirely on the Engineer. But in most cases they do, new buildings.

Q. And I presume in a new building that certainly would be true? A. Yes, sir.

Q. So it certainly would have been so in this case? A. Yes, sir.

Q. And on those blueprints is shown the electrical layout, among other things? And those are submitted, I believe you said, to the Electrical Engineers Office for approval? A. Yes, sir.

335 Q. And any question of whether there are sufficient outlets, and the wiring, and all the rest of it that I don't understand very well, all this is thrashed out with him, and it is required that the Electrical Engineer be satisfied -- A. Yes, that is true.

Q. -- that there will be a good electrical system? A. Yes, sir.

Q. And then these blueprints are passed on to your office, is that true, for the actual inspection to make sure that they comply with the installation of appliances that is referred to on the plans, is that right? A. Yes, sir, and we will have access to the drawings.

Q. At all times? A. Yes.

Q. Even before inspection of the work begins, is that true? A. Yes, sir.

Q. Now, if any exception were made, or any particular notation were made as to what installations should be or were required, that would be noted on those blueprints, wouldn't it? A. Yes, sir, I would say so.

Q. Now, what becomes of those blueprints after the construction
336 is completed? A. Well, sir, they are placed back in the Central Permit Files.

Q. Did you look for the blueprints of this construction? A. Sir, I didn't. Mr. Dixon did.

Q. Did you make a search the other day for the records pertaining to this? Did you find the blueprints? A. No, sir, they are not there.

Q. And you don't know where they are? A. No, sir.

THE COURT: The question was whether you made a search for them.

THE WITNESS: Yes, sir. I went back to the Central Permit Files and checked in the files, and looked in the racks where they keep the drawings.

BY MR. O'DONOGHUE:

Q. This blueprint is the only place where you would find anything about changes in the requirements made by the Electrical Engineer, is that true? A. Not necessarily. They may have been made on the building permit application, but generally they are made on the blueprint.

Q. So your failure to find them makes it impossible for you to

say whether any changes in the requirements were made by the Elec-
337 trical Engineer in this case. Isn't that true? A. Yes, sir.

Q. You can't tell us from all these miscellaneous scraps of paper you brought here? A. No.

Q. These inspections, are they most usually made as the building progresses? Is that so? A. Yes, sir.

Q. Now, when they are made are they made at any specific time, or made at the request of the Director, or what? A. They are generally made at the request of the Director.

Q. Does he wait until the building is substantially completed to have it inspected, or at certain times to see what is going into the building? A. Yes, sir. We inspect at certain times, but the contractor generally calls us after he has installed so much equipment and we go out and look at it.

Q. And do you try to make that inspection as soon as he calls for it? A. Yes, sir, we will make it the next day. If he calls today we will have a man on it tomorrow.

Q. Tomorrow? A. Yes, sir.

* * * * * *

338 Q. Now, if a final inspection were made on April 5, 1954, that would indicate to you in accordance with the custom of your office, that a request for building inspection had probably been made the day before? A. Yes, I would say so.

Q. And it was only then that the electrical work was completed and ready for final inspection? A. That it was ready for final inspection, yes.

Q. Was there any reason to suppose that the inspection of February 11 was supposed to be a final inspection? Is there anything on your cards which indicates that? A. Yes, sir. There is a notation on the card, if I can see it I can tell you exactly what it was for.

Q. What was the inspection of February 11 for? A. The inspection of February 11, the inspector went there and found defects on the job.

Q. Well, what was the purpose of the inspection? Was that intended to be a final inspection? Is there anything to indicate that?

339 A. No, sir, it was not.

Q. It was probably one of the inspections in the course of the building, is that right? A. It is very possible.

Q. Is there any indication of what those defects were? A. Yes, sir.

Q. Is there? A. Yes.

Q. What were they? A. There was a bolt off -- wait a minute --

* * * * * *

THE WITNESS: Yes, sir, I am trying to interpret this. Bolt off receptacle.

BY MR. O'DONOGHUE:

Q. What does that mean? A. Sir, that is a very minor defect.

* * * * * *

THE WITNESS: * * * A bolt off the receptacle merely means that the contractor had failed to put the bolt on the receptacle.

BY MR. O'DONOGHUE:

Q. What is the receptacle? A. The outlet in the wall.

Q. The wall outlet, and what else? A. Well, he had a cable in the shaft.

340 Q. What does that mean? A. That was to be strapped. That meant that he had a piece of cable in the shaft somewhere in the building, and that the contractor had failed to put enough clamps on it.

* * * * * *

THE WITNESS: A cable in the shaft to be strapped means that the contractor had failed to secure the cable properly to be placed, hadn't put enough clamps in the cable. Straps, yes, sir. * * *

Q. What else was indicated? A. Put a switch in the toilet in the basement. The Code requires that you have a switch in the toilet room and the contractor had failed to put one in there.

Q. Anything else? A. No, sir.

Q. Those were rather minor things, were they not? A. I

would say so.

Q. They must have been corrected by April 5? A. Yes, sir.

Q. There is no indication anywhere else on those records of any
341 failure to comply with any other section of the Building Code, is there? A. No, sir. * * *

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q. * * * The notation of defects on * * * February 11, * * * indicated defects in the work already completed, is that correct? A. Yes. That would indicate the fact that there were defects in the work that had been installed, yes, sir.

Q. That doesn't indicate, does it, sir, that the job had been completed as of that date, does it? A. No, sir.

Q. Do we understand therefore that the job may well have been in a state of being completed, that additional work had not been completed as of that date? A. Sir, that could very well be the case, yes sir.

Q. And I believe you indicated to Mr. O'Donoghue on his question to you that it is likely, from your experience and procedure in the office, that you did not receive a call for final inspection on the work until
342 the day before April 5, probably around April 4? A. Sir, that is generally the case, but that has to be explained to you.

Q. Sir? A. The contractor deals directly with the field man in most cases, Mr. Wolcott being a field man at that time. He called the office and Mr. Wolcott went out on the job, and if noted any defects he would call it to the contractor's attention so that he could correct them as he went along on the job. We don't wait until the job is completed and then throw the defects at the man, that wouldn't be fair to him.

Q. That would be as of the date he made the inspection in February? A. Well, whenever the field man went there.

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344 ZENER DIXON

* * * * * *

DIRECT EXAMINATION

BY MR. GOLDBERG:

* * * * * *

Q. And what is your occupation? A. In charge of the files of the District Building.

Q. What files are you in charge of? A. I have under me those in connection with building permits, which are electrical, plumbing, and water installation.

Q. Does that include the files of the Building Inspection? A. Yes, sir.

Q. Do we understand that all files of the Director of Inspection, including plumbing, water, electrical and so forth, are filed in your division? A. Yes.

Q. And would that include electrical inspection? A. Yes, sir.

Q. You are here under subpoena, are you not? A. Yes.

345 Q. And that subpoena requires you to produce any and all records pertaining to 2610 Tunlaw Road, Northwest? A. Yes.

* * * * * *

Q. Just to be clear, is there anything whatsoever up at the District Building this morning covering 2610 Tunlaw Road, Northwest, in the Central Permit File covering 2610 Tunlaw Road that either Mr. Lewis hasn't brought down or that you haven't brought down? A. Not

346 to my knowledge. I made a thorough check this morning and found nothing.

Q. This is a case of the permit, is it not? A. Yes, that is right.

Q. Now, insofar as this permit was concerned, do you have any copies of the blueprints of the original construction? A. No, sir. After a period of around one or two years after that building has been completed and the final report is turned in by the inspector, I no longer keep those blueprints.

Q. What is done with the blueprints? A. They are discarded, except a building four or five stories is kept in our permanent file, but

this I think is a three story building.

* * * * * *

347 Q. And I understand that is everything except the blueprints?

A. Absolutely.

Q. In the usual course of events those have been destroyed?

A. That is correct.

* * * * * *

348 MR. O'DONOGHUE: First of all I object generally because it has brought out quite clearly by Mr. Lewis that any exceptions or any changes of anything in the electrical requirements would have appeared on the blueprints, nowhere else, and they had been destroyed, so this is not evidence in any way of what determination was made by the Electrical Engineer's Office on that problem that has plagued us so much. In other words, these records do not prove anything.

THE COURT: The objection is overruled.

* * * * * *

355 MR. GOLDBERG: Ladies and gentlemen, Plaintiff's Exhibit No. 21 is a plat for building permit at Lots 1289, 1290 and part of Lots 1288 and 1275, Square 1301, recorded in Book 131, page 277, purporting to be a building permit for 2610 Tunlaw Road, Northwest.

The pertinent portion which I wish to call to your attention if I may is that this building on the Tunlaw Road side is 44.83 one-hundredths feet long, or deep along Tunlaw Road, running along Tunlaw Road; that on the entrance side the building runs 38.15 feet to the center entrance, and then runs 38.15 past the center entrance. In other words, they have 38.15 feet to the entrance, and 38.15 feet past the entrance. The entranceway itself is 6.33 feet wide, that is, six and one-third feet, and the entrance is recessed three feet. The building is set on a lot 103 deep by 77.83 feet wide.

* * * * * *

374 MR. O'DONOGHUE: Your Honor, I would like to suggest that this regulation which has been admitted in evidence is not applicable to this situation, that the requirement is not to provide any circumstances such

as we are dealing with in this particular case. It has to do with existing requirements and emergency lighting. In the whole context, the introduction says:

"The purpose of this article is to provide for exit signs and for general and emergency lighting pertaining to exit facilities."

* * * * * *

393 RULING FROM THE BENCH

THE COURT: Gentlemen, I place much weight in this case upon the undisputed facts of a building in the course of construction which had not been completed, and it is a fact that Tanner, and the occupancy of his partner, was had with knowledge that the building was uncompleted and accordingly, from my way of thinking, accepted it in the condition it was in, and by doing so he assumed all of the risks that were obvious to him and, of course, it was obvious that there was no light over the front door, and it was obvious that there was a glass entrance, so I am compelled to hold that there was an assumption of risk.

394 Furthermore, I think I must then necessarily hold from the case as it is presented plaintiff was guilty of negligence, the sole negligence contributing, and accordingly the defendant's motion will be granted.

Will you call the jury, please?

(Thereupon, the jury was recalled into the court room.)

THE COURT: At this point I will excuse the alternate jurors and you may be free to report to the juror's lounge.

I will say to the members of the jury that the Court finds that the plaintiff has failed to make out a case which would sustain a verdict and judgment against the defendant.

Accordingly, at the direction of the Court, and on the responsibility of the Court, you will please rise and return a verdict for the defendant.

THE DEPUTY CLERK: Members of the jury, by direction of the Court your verdict is for the defendant, the Barclay Corporation, and that is your verdict so say you each and all.

* * * * * *

Prettyman
Burger

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 26 1957
Joseph W. Stewart
CLERK

No. 14,182

PHYLLIS NIELSEN,

Appellant,

v.

BARCLAY CORPORATE,
A Body Corporate, et al,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellant, the questions presented are:

1. Whether the trial court erred in granting appellee's motion for a directed verdict in favor of the defendant, Sidney Z. Mensh, trading as Sidney Z. Mensh and Company, at the conclusion of appellant's opening statement.

2. Whether the trial court erred in granting appellee's motion for a directed verdict as to the remaining defendant, the Barclay Corporation, a body corporate, at the conclusion of the plaintiff's case, where:

(a) The evidence clearly showed that the appellee, owner of an occupied fourteen (14) unit apartment building, facing a court, and approached by a concrete walk from a street not provided with public street lighting, had completely failed to comply with a municipal regulation requiring an emergency white light over the doorway and where the appellant, guest of a tenant, proceeding with caution in a dim area, sustained injuries on the evening of February 26, 1954.

(b) Where the doorway at which appellant was injured constituted the sole front entranceway and exitway from the apartment building which was then occupied by five tenants and a resident manager on the evening of appellant's fall.

(c) Where the evidence clearly showed that the sole front entranceway and exitway was comprised of a glass door side by side with an equally sized floor to ceiling clear and deceptive glass panel, without markings or identification, which coupled with the lack of light, created a dangerous illusion, causing appellant's injuries.

(d) Where the occupancy permit had not been approved nor electrical installations been fully approved as of the date of appellant's injury, although applications for rentals had been accepted for two (2)

months prior to appellant's injury, apartments rented and the building at all times posted with "open" and "for rent" signs.

3. Whether the trial court erred in denying appellant's motion for a new trial.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,182

PHYLLIS NIELSEN,

Appellant

v.

BARCLAY CORPORATE,
A Body Corporate, et al,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was commenced by the appellant in the United States District Court for the District of Columbia seeking Thirty-Five Thousand Dollars ($35,000.00) damages for personal injuries allegedly sustained as the result of the joint and several negligence of the appellee, Barclay Corporation, owner of the apartment house building at which the appellant fell, and the negligence of Sidney Z. Mensh, trading as Sidney Z. Mensh and Company, the managing operator of the apartment house where the accident occurred. The jurisdiction of this Court rests under the provisions of Sec. 11-306, D. C. Code (1951 Edition).

Trial began before the District Court on the 15th day of May, 1957. At the conclusion of the appellant's opening statement and upon motion by the defendant, Sidney Z. Mensh, trading as Sidney Z. Mensh and Company, the Court granted a motion for a directed verdict in favor of this defendant. Thereafter, on the 20th day of May, 1957, at the conclusion of five days of testimony and the conclusion of the plaintiff's case, on motion by the remaining defendant, the Court granted a directed verdict in favor of the Barclay Corporation, appellee herein.

Thereafter, appellant filed a motion for a new trial, this motion was denied on the 17th day of June, 1957. Appellant filed a notice of appeal on the 2nd day of July, 1957. The jurisdiction of this Court is invoked under 28 U.S. Code, 1291.

STATEMENT OF THE CASE

On the 26th day of February, 1954, the appellant, plaintiff below, sustained severe and permanent injury to her shoulder and arm while in the process of entering an apartment house building located at 2610 Tunlaw Road, N. W., in Washington, D.C. (J.A. 18, 19, 22) This building was one of a group in a development which had been built by the Barclay Corporation, appellee, and was owned by it at the time of this accident. (J.A. 2) The building contained three (3) stories plus a terrace level, with a total of fourteen (14) apartments. (J.A. 10, 31) The building was under the management of and operated by Sidney Z. Mensh, trading as Sidney Z. Mensh and Company (J.A. 2, 3) On the evening that the appellant sustained her injury, she was entering the apartment building as a guest of the tenant, Howard Tanner, and John Nielsen, who shared the apartment and whom she later married. (J.A. 19) Mr. Tanner had signed a lease for a terrace level apartment about two weeks earlier. He and Mr. Nielsen had, by agreement, moved in a few days earlier, over the George Washington birthday week-end. (J.A. 38) They had been advised they might move in any time after February 15. (J.A. 37)

There were five tenants already occupying apartments in this building on the date appellant sustained her injuries. (J.A. 10, 38) These included the resident manager, Mrs. John Lakenan, who had moved in prior to February 15. (J.A. 10, 38) Apartments were offered for rent during the construction period which began June 10, 1953, and applications accepted as early as January 1, 1954. (J.A. 8, 10) The first tenant, Irene Hudson, moved in February 15, 1954. (J.A. 10) There were signs on the building indicating it was for rent. The building bore "open" signs on the street side and directly at the entranceway prior to and at the time of appellant's accident. (J.A. 15, 38).

The building was not parallel to the street, but was perpendicular to it, facing a court, with another building of like size on the opposite side of the court. (J.A. 31, 34) The building was approached by a concrete walk from the street which led to the only front entrance, located midway of the apartment building. (J.A. 32) The building had a frontage of 76 feet including the entranceway which was six and one-third (6-1/3) feet in width. (J.A. 56) This entrance served also as the exit from the building. (J.A. 15) The entrance proper was recessed about three feet in from the front of the building with an overhang of equal size above it. (J.A. 32, 56) The concrete slab which constituted the entranceway was above the level of the walk. (J.A. 32) The entrance proper was divided in two equal sections; the left section was a glass door which opened from center to left and was framed in a small wood frame; the other half of the entrance proper on the right side consisted of a solid slab of clear glass from floor to ceiling. (J.A. 32) This pane of glass was free of markings or framing and was simply a large clear pane of glass from floor to ceiling, without markings or identification of any kind. (J.A. 33) The only other entrance was a service entrance through furnace or storage room, in the rear of the building. (J.A. 32)

On the evening of the accident, appellant approached the front entrance via the concrete walkway from the street. (J.A. 21) She went ahead of Mr. Tanner, the tenant, who had given her the key to open the apartment while he and Mr. Nielsen removed from the car some belongings which they were bringing to the apartment. (J.A. 20) Appellant had been in the building on one previous occasion some days before during daylight hours, for a short period of time. (J.A. 19) On that occasion, the entrance door having been held open for her as she carried some packages into the building, and also when she left, she had paid no particular attention to the entranceway construction. (J.A. 19, 24)

On the evening of the accident, the walkway was unlit. Streets were dark at the hour of 6:30 P.M. when appellant arrived. (J.A. 20) There was no outside lighting at the building, nor were there any street lights located in the vicinity. (J.A. 33, 34, 35) There was no outside lighting at the entrance of the building, nor over the front door which served as exit and entrance. The front door entered upon a vestibule about six feet deep, which itself contained no lighting. (J.A. 39, 40) The vestibule led up several steps to a first floor landing and down several steps to the terrace level. An electric bulb on the first floor landing, not visible from the vestibule, reflected a small amount of light to the entranceway. (J.A. 43) This lighting at the entrance was very dim. (J.A. 21, 29, 42, 43, 44)

As the appellant started up the walk, she heard the footsteps and saw the outline of someone apparently entering the building from the opposite direction, where the central parking lot was located. (J.A. 27-28-33) She proceeded up the walk at a cautious pace commensurate with the lack of lighting in the area. (J.A. 29, 30) As appellant reached the building, she made a right turn, stepped up to the slab and saw what appeared to her in the dim light to be a doorway left open. (J.A. 21) Proceeding on this assumption, she walked into

and struck against the large clear pane of glass which comprised the right half of the entranceway; (J.A. 21) stunned, she fell back, off of the slab, onto the walkway, landing on her back, her feet at the base of slab. (J.A. 42) The appellant was briefly stunned or unconscious. (J.A. 30) Mrs. John Lakenan, resident manager of the building, came to her side as well as Mr. Tanner and Mr. Nielsen. (J.A. 21) Appellant was not permitted to testify as to the conversation which occurred between her and the resident manager at the scene, nor was she or Mr. Nielsen permitted to repeat any conversation with and exclamations or remarks of the resident manager spontaneously made at the time. (J.A. 21, 22, 42) Much testimony was devoted to the fracture of the upper right arm and permanency of injuries sustained by appellant which is not relevant to this appeal.

Inspection immediately after the accident revealed that there was no evidence of any outside light over the common entrance and exitway, either installed or in the process of installation. (J.A. 36)

The tenant, Howard Tanner, a traveling representative, was not available to testify at the trial. Mr. Nielsen testified that he first became aware of the lack of an outside exit light on the evening that appellant was injured. (J.A. 44)

The appellee had applied for a certificate of occupancy for these premises on February 23, 1954, three days before appellant's injury, but the certificate was not approved and issued until November 2, 1954. (J.A. 16) Final approval of electrical installations was made on April 5, 1954. (J.A. 46) The appellee stated in answers to interrogatories that the subject building was "virtually completed" on March 2, 1954. (J.A. 8)

The appellee admitted in answer to interrogatory that the outside light was not present over the common entrance and exit on the evening that appellant was injured, but was thereafter installed on March 3 or 4 (J.A. 9)

Appellee admitted that it, together with its managing agent, had sole and exclusive control over the installation, construction and maintenance of the approaches and entrances to this building. (J.A. 2, 3)

There was in force and effect on the date of the appellant's accident, and admitted into evidence, a Building Code regulation which required that there shall be an emergency white light over all required exit doors on the outside of the building, except where determined by the Director of Inspection that adequate street lighting is present. (J.A. 16) A second regulation was introduced to show that the aforementioned regulation was applicable to premises 2610 Tunlaw Road, N.W., scene of the appellant's accident. (J.A. 17)

At completion of appellant's opening statement, Sidney Z. Mensh, trading as Sidney Z. Mensh and Company, moved for a directed verdict. This motion was granted. (J.A. 12) The action then proceeded against the appellee, Barclay Corporation, alone. At the conclusion of appellant's case after 5 days of trial, appellee moved for a directed verdict. There was a ruling from the Bench (J.A. 57) and motion was granted. (J.A. 13)

Appellant thereafter moved for a new trial. (J.A. 11) The motion was denied (J.A. 14) and this appeal followed.

STATUTES INVOLVED

Sec. 11-306, District of Columbia Code, (1951 Ed.)

STATEMENT OF POINTS

Appellant intends to rely on the following points:

The District Court erred:

1. In granting the motion for a directed verdict made by Sidney Z. Mensh, t/a Sidney Z. Mensh & Company, a defendant in this action, at the close of the appellant's opening statement.

2. In granting the motion for a directed verdict made by Barclay Corporation, appellee at the conclusion of appellant's case.

3. In denying appellant's motion for a new trial.

SUMMARY OF ARGUMENT

1. Under the decisions of the Supreme Court of the United States and this Court, a motion for a directed verdict at the conclusion of plaintiff's opening statement may be properly granted only when it appears clearly and unequivocally that no cause of action exists, and that plaintiff could have no recovery. In considering such a motion, plaintiff is granted the benefit of all favorable inferences that may be drawn from counsel's statement and all doubts must be resolved in plaintiff's favor. Mere indefiniteness is not enough to warrant the granting of such a motion. In the case at bar, on opening statement, counsel for plaintiff told the jury that the defendant Sidney Z. Mensh was admittedly the operating manager of the occupied apartment building at the time plaintiff sustained her injuries; that by virtue of the provisions of a municipal regulation, the owner and operator of the apartment building were both under a duty to provide and maintain outside lighting over the entrance to the premises where plaintiff was injured; that they failed to comply with this regulatory obligation, and further failed to comply with their obligation to maintain the building in good condition for tenants and their guests; that the foregoing violations and absence of light, coupled with the existence of a deceptive glass front to the entranceway, combined to cause the injuries suffered by the appellant. It is respectfully submitted that judged by the standards which this Court has set up to evaluate a motion for directed verdict at conclusion of opening statement, the foregoing statement did not justify the trial court in finding clearly and unequivocally that no cause of action existed and that plaintiff could have no recovery, giving counsel's statement the benefit of all doubts and favorable inferences.

2. In granting appellee's motion for a directed verdict, the Court found that the tenant had moved into a building which had not been completed, provided with a glass entrance and no outside light. The court held this to constitute an assumption of risk which it imputed to the

appellant. The Court also held that the appellant "was guilty of negligence, the sole negligence contributing", and upon this premise granted the appellee's motion. The evidence presented by the appellant at trial showed the violation by the appellee of a municipal regulation which imposed upon it a duty to provide an outside light at the front exitway for the safety of tenants and their guests. Further evidence showed that the appellee actively solicited, advertised for and issued leases and permitted tenancy of more than one-third of the apartments in this building prior to date of appellant's injuries, while being aware of and derelict in its duty to provide and maintain safe approach and entranceway to the apartment building as required by law and the decisions of this Court; also in its failure to obtain permit to occupy the building until ten months after appellant's accident. The additional testimony of appellant and witness, supported an interpretation of prudent conduct and reasonable care on the part of the appellant at the time of her injury. It was error on the part of the Court to find assumption of risk and negligence as a matter of law in the presence of proof of a duty on the part of the appellee, as well as in the presence of evidence which abundantly indicated reasonable on the part of the appellant for her own safety at the time of her injury. Nor was there any evidentiary basis for the Court's conclusion that the building was not completed at time of appellant's injury, since by appellee's own admission there were six tenants in occupancy at the time of her injury.

The Supreme Court of the United States and this Court have consistently held that in considering a motion at conclusion of plaintiff's case, the Court assumes that the evidence proves all that it may reasonably be found to establish and all favorable inferences flowing therefrom. If the evidence is such that there is room for sensible men to differ in their conclusions, then such a motion should not be granted. The decisions of this Court in like cases unquestionably support the position that on the evidence adduced on appellant's case at trial, there

was abundant evidence of negligence sufficient to take the case to the jury.

3. The finding by the Court of assumption of risk as a matter of law in the instant case runs contrary to the decisions of this Court, as previously stated. It also runs contrary to all reasonable interpretations, since it places upon the tenant all risk and immunizes the landlord from all liability for injuries which result to tenants or their guests because of affirmative neglect and non-conformance by the landlord with municipal regulations, and in avoiding landlord's basic obligation to construct and maintain the approaches to the apartment building so that they might be reasonably safe.

It would appear that there was an obligation on the part of the appellee in accepting six tenants in a fourteen unit building to see that the structure was in compliance with regulations and in a reasonably safe condition from the initial occupancy. If this be not so, then when would landlord's responsibility for statutory safeguards and reasonable care commence? It would appear that if any risk should be assumed, it should be on the part of the landlord in soliciting the leases and in making the premises available to tenants for rental revenue, prior to completion of basic safeguards to which tenants are entitled by law and by judicial interpretation.

ARGUMENT

1. The Court erred in granting motion for directed verdict on behalf of Sidney Z. Mensh, t/a Sidney Z. Mensh & Company, at conclusion of plaintiff's opening statement.

The decisions of the United States Supreme Court and of this Court of Appeals enjoin the trial judge to consider and construe with great liberality opening statements which are subjected to motion for directed verdict. Lack of definiteness in an opening statement is not fatal. Only when it appears clearly and unequivocally that no cause of action exists, after resolving all doubts in plaintiff's favor, may a verdict be directed on opening statement.

Appellant's opening statement is set forth on pages 2 through 12 of the transcript, with pertinent extracts on pages 17 and 18 of the joint appendix. In it, appellant sets out that the defendant, Sidney Z. Mensh & Company is admittedly the manager of the apartment development and building where appellant sustained her injury; that the evidence would show that there were in effect District of Columbia electrical regulations and building regulations that required the apartment where appellant was injured to have an outside light over the doorway; that the appellant, an admitted guest of a tenant, was owed a duty by both the owner of the building,the appellee, and the defendant, Sidney Z. Mensh & Company, to maintain the building in first class condition for the tenants and their guests; that the owner of the building and Sidney Z. Mensh & Company both failed to comply with District of Columbia regulations requiring them to maintain an outside light; that in the darkness of the evening, the absence of the outside light required by law, coupled with the presence of a deceptive solid glass panel in the entrance combined to cause the appellant, using the area in a careful and prudent manner, to sustain her serious injuries.

Appellant's opening statement brought out that the evening was dark, and the illumination extremely dim along the walkway that led to the apartment entrance; the recessed entranceway was carefully described and the manner in which the lack of lighting, combined with the unorthodox glass entrance, caused the appellant to sustain her injury. Remarks made by the resident manager indicating there had been previous difficulty at that entrance were also alluded to in the opening statement by appellant's counsel.

It is difficult to conclude, in light of the foregoing, how the trial court could reasonably find that appellant's opening statement completely failed to meet the minimum requirements set up by many decisions of this Court as will as the Supreme Court of the United States.

In the case of Best v. District of Columbia, 291 U.S. 411, the Supreme Court of the United States set the standard which has since been generally followed by this Court:

> ...."There is no question as to the power of the trial Court to direct a verdict for the defendant upon the opening statement of plaintiff's counsel where that statement establishes that the plaintiff has no right to recover....But the power is not properly exercised if the opening statement leaves doubt as to the facts or permits conflicting inferences. Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (citing cases)... The opening statement of counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence....Plaintiff is entitled to the benefit of all inferences that may be drawn from his counsel's statement. To warrant the court in directing a verdict for defendant upon that statement, it is not enough that the statement be lacking in definiteness but it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists." (citing cases.)

Following this decision, there have been many similar rulings by this Court on the sufficiency of opening statements. To quote only the more recent decisions, regard the statement of this Court in Firfer v. United States, 93 U.S. Appeals, D.C. 216: "...for if there is any doubt as to his failure to state a claim upon which relief can be granted, the matter must be left to the jury for determination, or where, as here, the Court sits without a jury, he should be permitted to put on his entire case. For the dismissal to be sustained, therefore, it must appear clearly and unequivocably from the opening statement that appellants could have no recovery."

See also the case of Pomeroy v. Pennsylvania Railroad, 96 U.S. Appeals, D.C. 128, quoting from Best v. District of Columbia, supra: "To be sure, plaintiff's counsel failed to spell out with any specificity what testimony he expected from the employees of the railroad. But an opening statement 'is ordinarily intended to do no more than to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence'; and to direct a verdict upon an opening statement 'it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists.'"

Further light on the liberal interpretation of opening statements as respects definiteness is set out in the case of Halin v. United Mine Workers of America, 97 U.S. Appeals, D.C. 210: "Plaintiffs are entitled to the benefit of all inferences that may be drawn from their counsel's statement. To warrant the court in directing a verdict for Mohler upon that statement, it is not enough that the statement be lacking in definiteness but it must clearly appear after resolving all doubts in plaintiff's favor, that no cause of action exists."

See also Greene v. Hathaway, 89 U.S. App. D.C. 229, 191 F.2d 656, which holds that the plaintiff is entitled to the benefit of all inferences which might be drawn from the facts stated.

It would reasonably appear that appellant's opening statement of the case against the defendant, Sidney Z. Mensh & Company, as judged in light of the standards set up in the foregoing quoted decisions, at the very least staggered within the generous bounds set up by this Court in weighing the opening statement. Simply stated, appellant set forth the relationship between the parties, spelled out the duty of the defendant generally and as fixed by statute, the violation of duty and the resulting injury to the appellant. It would appear that the mere allegation of violation of a municipal regulation by the defendant, Sidney Z. Mensh & Company, resulting in injury, should have been adequate to keep the case in Court, although it is submitted that appellant went beyond this. The opening statement charged both defendants with violation of a duty imposed by law to maintain an outside light at the apartment building where appellant was injured, and charged this violation to be a cause of appellant's injury. It is difficult to conclude how the trial court could, under the above-mentioned decisions of this Court, conclude that the allegations of the opening statement, reasonably identical as to both, were adequate to hold one defendant, but not the other.

It is therefore respectfully urged that the lower Court erred in directing a verdict in favor of Sidney Z. Mensh on opening statement.

2. The trial court erred in granting the motion for a directed verdict in favor of Barclay Corporation, appellee, at the conclusion of appellant's case.

At the conclusion of appellant's case, a motion for directed verdict was made by the appellee, Barclay Corporation. In a ruling from the bench, the Court granted the motion, stating as follows:

> "Gentlemen, I place much weight in this case upon the undisputed facts of a building in the course of construction which had not been completed, and it is a fact that Tanner, and the occupancy of his partner, was had with knowledge that the building was uncompleted and accordingly, from my way of thinking, accepted it in the condition it was in, and by doing so he assumed all the risks that were obvious to him and, of course, it was obvious that there was no light over the front door, and it was obvious that there was a glass entrance, so I am compelled to hold that there was an assumption of risk.

> Furthermore, I think I must then necessarily hold from the case as it is presented plaintiff was guilty of negligence, the sole negligence contributing, and accordingly, the defendant's motion will be granted." (J. A. 57, R. 386-387)

It is apparent from the foregoing ruling that the court's action in granting the directed verdict was predicated on two findings:

1. Assumption of risk by tenant as a matter of law, this assumption being imputed to the appellant guest.

2. Negligence on part of appellant as a matter of law.

It is respectfully urged that the trial court erred in both of the foregoing conclusions.

Initially, it may be stated that the decisions of this Court have constantly and consistently protected the right of the plaintiff to have his case considered by a jury.

> "Where reasonable men may well differ in their conclusions from the evidence, the issues should be submitted to the jury" See Crane v. Postal Telegraph Cable Co., 48 App. D.C., Terminal Taxicab Co. v. Blum, 54 App. D.C. 357, U.S. v. Stewart, 61 App. D.C. 115.

When a motion for directed verdict is made at the conclusion of the plaintiff's case, this Court has pointed out that it must be even more strictly construed:

> "It is only when all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the court; and less latitude in directing a verdict for the defendant is allowed the trial court where the direction of the verdict is sought at the close of the plaintiff's evidence than when it is asked after all of the evidence, including that of the defendant, is in." Catholic University of America v. Waggaman, 32 App. D.C. 307.

Appellee's motion was made, of course, at the completion of appellant's case and before any evidence whatever had been put on by appellee. Therefore, the only evidence before the Court was that presented by the appellant.

In its ruling granting the motion, the trial court initially stated that it placed "much weight in this case upon the undisputed facts of a building in the course of construction which had not been completed", known to the tenant Mr. Tanner and Mr. Nielsen, and therefore accepted subject to all risks that were obvious.

It is respectfully submitted that there is nothing in the record upon which the trial Court could find undisputed facts establishing that the building was in the course of construction when occupied by Mr. Tanner and Mr. Nielsen. On the contrary, all of the evidence pointed to the fact that the building had been completed to the extent that the appellee intended to complete it. Apartments had been offered for rent during the construction period, beginning June 10, 1953 and applications accepted as early as January 1, 1954. The resident manager had moved into the building, known as premises 2610 Tunlaw Road, N. W., prior to February 15, 1954, and five tenants were in possession of Apartments 1, 101, 102, 103, and 203 on February 26, 1954, the date that appellant was injured, (See interrogatories and answers (J. A. 6, 10). "Open" signs had been prominently posted on the building for some time (see plaintiff's exhibit 11, photo J. A. 15), intended to invite leasing and entering. There was no testimony in the record indicating that the building was in course of construction, save evidence of lack of sod. Nor was there any evidence that the tenant Mr. Tanner, or Mr. Nielsen, were aware that the building was in course of construction (J. A. 44, 45).

It would appear reasonable to conclude that the appellee must in fact have considered the apartment building completed if it saw fit to accept leases from and grant possession to five tenants who had been occupying their apartments for a period of two weeks or more as of the date appellant was injured. It would further appear that the legal and statutory obligations of a landlord toward his tenants would commence when the relationship of landlord and tenant began, which is to say, when the tenant occupied his or her apartment unit, pursuant to agreement.

In next considering whether there was an assumption of risk by the tenant, it is proper to review the decisions of this Court with respect to the established law as respects the responsibility of the landlord to the tenant in apartment buildings. Since it is undisputed that the appellant was a guest of the tenant, the law in this jurisdiction is clear that an invitee of a tenant is entitled to the same rights and subject to the same responsibilities.

In the case of Pessagno v. Euclid Investment Co. 72 App. D.C. 141, this Court held the obligation of the owner of a large apartment house to be:

> ".....not only to use ordinary care to construct the approaches and other parts of the building under his exclusive control so that they will be reasonably safe, but likewise, after notice, to exercise ordinary care to keep them free from conditions, whether permanent or temporary, which make them dangerous to tenants or their guests. Wardman v. Hanlon, 52 App. D.C. 14, 280 F.988, 26 A.L.R. 1249".

It will be noted that this decision, which is still the law, requires not only reasonably safe maintenance but also requires reasonably safe construction, of approaches and other parts of the building under the exclusive control of the owner or landlord. It will be remembered that the appellee admitted its exclusive control over the area where appellant was injured. (J.A. 2, 3, Par. 4, Complaint and Answer).

In the later case of Kay v. Cain, 81 U.S. Appeals, D.C. 24, this Court spelled out more clearly the obligation of the landlord as respects facilities for lighting portions of building under its exclusive control:

> ".....in the District of Columbia if a landlord 'leases separate portions of the same building to different tenants and reserves under his control the halls, stairways and other portions of the building used in common by all of the tenants as a means of access to their respective rooms or apartments, he is under an obligation to use reasonable diligence to keep the stairways and other portions of the building so retained under his control, in a safe condition'. Other courts held in other times that there is no such obligation in regard to lighting.....But we do not find that this exception to the lessor's general duty of

> care has ever been adopted by the courts of ....the District of Columbia. We think the general duty of care applies..... In respect to lighting as in other respects there is no question of requiring more than reasonable or ordinary care, which means reasonably safe conduct, but there is no sufficient reason for requiring less."

It is clear from the evidence, of course, that the appellee failed to exercise reasonable or ordinary care to provide lighting in the "portion of the building used in common by all of the tenants as a means of access to their respective rooms or apartments." The evidence was abundantly clear that no lighting of any kind was provided by the appellee on the outside of the building, along the walk, or over the entrance. Nor was there any lighting fixture in the vestibule. The sole light available in this area consisted of a dim indirect reflection from a light on the first floor landing.

It was also clearly established that there was no street lighting in the vicinity of this apartment building.

It being normal procedure for tenants to use the front entrance and exit from an apartment building, certainly the evidence presented by appellant regarding complete absence of artificial lighting or facilities for such lighting created a question for consideration by the jury as to whether the appellee had violated its duty as enunciated. Pessagno v. Euclid, supra and Kay v. Cain, supra.

But in addition to this general evidence of negligence in failing to reasonably provide lighting in public areas of the apartment building, appellant submitted evidence of failure on the part of the appellee to comply with a District of Columbia Building Code regulation which required an outside white light over the only door which served as a front entrance and exitway. This regulation was read into evidence (Exhibit 19, J. A. 16) together with an accompanying regulation which pointed out the applicability of the first regulation to the apartment building at which appellant was injured. (Exhibit 20, J. A. 17). Also presented in

evidence was proof that the District of Columbia did not issue a permit to occupy the building until November 4, 1954 (J. A. 16). Thus it was that appellant presented substantial evidence of negligence on the part of the appellee in its failure to observe its obligations as set up by this Court and as provided by municipal regulations.

We find in the case of Hill v. Raymond, 65 U.S. Appeals, D.C. 144, strong support for the position that the foregoing evidence was unquestionably sufficient to take the case to the jury. In the latter case a tenant of a small apartment house sustained a fall while descending a common stairway in the building. In this particular case, the plaintiff had lived in the building for some time. There had never been a light present over the stairway and plaintiff was aware of the lack of light. There was placed in evidence a regulation then in force and effect which required a white light over the inside stairway. The language of the Court in the Hill case is very significant in a consideration of appellant's position in the instant case:

> "We will now consider the alleged negligence of the defendant in failing to reconstruct stair treads of the proper width and to place lights in the hallways and stairways, as required by statute and regulations. While it maybe going too far to say that this amounts to negligence per se, it is certainly such evidence of negligence as would be proper for consideration of the jury. (Underlining supplied) In New York, under a similar statute, it has been held in Brown v. Wittner 43 App. Div. 135, 59 N. Y. S. 385, that the failure to have a light burning in a tenement house hallway is in violation of the statute, and where injury occurs as a result of that failure, a right of action arises in favor of the injured party; and the issue of defendant's negligence is for the determination of the jury." (Citing cases)

There was, of course, also considerable evidence of the presence of a large, clear, panel of glass reaching from floor to ceiling, which comprised the right half of the entranceway. The panel bore no markings of any kind to identify or distinguish it, and in the dim light of the night, created the illusion of an open entranceway. The combination of

lack of light and bizarre construction combined to create a deceptive and dangerous illusion that resulted in appellant's injuries, and should properly have been submitted to the jury under Young Mens Shop v. Odend'Hal, 73 Appeals D. C. 354, wherein the Court declined to find contributory negligence as a matter of law in a similar case. Certainly these factors, in addition to those previously stated, created issues on which reasonable men might well differ, and did not justify the granting of appellee's motion at conclusion of appellant's case.

Passing now to the trial court's finding that there was (1) an assumption of risk by the tenant, Tanner, in moving into premises 2610 Tunlaw Rd. N. W., in the absence of an outside light and in the presence of a glass entrance, and (2) negligence as a matter of law on part of appellant, we look again to the case of Hill v. Raymond, supra for the law in this jurisdiction on that point:

> "Coming to the question of contributory negligence on the part of the plaintiff, we think the law is well settled that the mere continued use of a tenant of common stairs and hallways of the tenement premises, when he is aware of the failure of the owner to provide lights, as required by the statute and municipal regulations, does not constitute contributory negligence as a matter of law, but merely raises a question for determination of the jury."

Furthermore, there is a serious question as to whether the trial court could properly invoke the defense of assumption of risk as a matter of law in this action before the appellee had put on its case. Certainly there was no clear and convincing evidence of such an assumption by the appellant. But further, and clearly in point is the fact that in order to permit the defense of assumption of risk, there must be evidence that the defendant had no duty to protect the other from the risk. In the case of Dougherty v. Tompkins Co., 99 U. S. App. 348, the Court said:

> "The elements which must be shown to give rise to the defense of assumption of risk are often stated to be, first, knowledge of the danger and second, a voluntary exposure to that known danger. To call this defense into play requires a showing that the person charged has no duty to protect the other from the risk..... The appellee's duty was declared and specifically defined in the District of Columbia regulation. The fact that appellant had an awareness of the admittedly visible condition created by a snowfall was immaterial to 'assumption of risk' for this recognition of obvious could not relieve appellee of his statutory duty of reasonable maintenance."

Certainly, the statutory obligation of the appellee in the instant case as well as its duty of reasonable care and maintenance of public portions of the apartment building, vitiates its effort to employ the defense of assumption of risk.

It will be borne in mind that the appellee was proceeding on a walkway which led to the only entrance to the front of the apartment building. This was the normal and proper entrance used by all tenants, since the only other entrance was through the rear of the building and into the storage and furnace room. Certainly, in the circumstances, though the walkway was dark and the entrance dim, it could not properly be concluded beyond question that appellant was guilty of contributory negligence as a matter of law in using the front walk to approach the entrance, especially in light of her testimony that she proceeded with caution in the circumstances then existing. It is for a jury to determine whether her conduct in the circumstances constituted negligence. Certainly fair minded men might readily differ on this set of facts.

Bearing on this point is a pertinent case in this jurisdiction, Muller v. District of Columbia, 16 D. C. 286, which is quoted with approval in Mosheuvel v. District of Columbia, 191 U. S. 247; the Court said:

> 'If the highway is wholly impassable, and in such condition that no reasonable man would attempt to pass it, the plaintiff does it at his own risk. But if it is not, and especially if it is the only access to his dwelling, the only duty on his part is the exercise of proper care to avoid accidents, and the burden is upon the defendant, not only to show knowledge of the defect on the part of the plaintiff, but to show, affirmatively, negligence, or the omission to take the proper care."

Referring further to the Mosheuval case, supra, which quotes the harmonizing English case of Clayards v. Dethick, 12 Q.B. 439, the Court succinctly states:

> ...."Whether the plaintiff had suffered by the defendant's negligence or by his own rash action was a matter of fact and of degree properly left to the jury;"

While it is true that the appellant had been to the apartment building briefly during daylight hours on one previous occasion, her visit gave her no reason to examine the entrance area for artificial lighting facilities, nor did she have the occasion to examine the glass panel or the door that was held open for her. Such a single visit under the quoted circumstances does not serve to charge her with knowledge of the danger that might exist after dark, nor could it conceivably be tantamount to assumption of risk or contributory negligence as a matter of law.

In the case of Gleason v. Academy of The Holy Cross, 83 U.S. Appeals, D.C. 253, which involved a fall from a step which was not visible due to an illusion caused by lack of light, the Court held; quoting Recreation Centre Corp. v. Zimmerman, 172 Md. 309, 191 A. 233, 234.

> 'If it could be found that (the step) was a danger which the careful visitor might not discover, and that the proprietor should have realized the fact, the court could not rule as a matter of law either that there was no breach of duty by the proprietor, or that there was contributory negligence or an assumption of risk by the visitor.'

To sustain the position of the trial Court in the instant case would appear in effect to affirm a decision which insulates the appellee against liability for clear violation by it of duties imposed by regulation, and of its obligations as spelled out in the decisions of this Court. If the position of the trial court is correct in charging the tenants with assumption of risk in leasing an apartment actively advertised and for which tenancies were solicited, when, then, would the appellee's responsibility for basic safeguards, such as lighting in public areas of the building be presumed to commence? Certainly, in the instant case, the letting and granting of occupancy to five tenants who occupied more than one-third of the rentable area in this building should set in motion the responsibilities of the landlord to its tenants and their guests. It would appear more reasonable that if any risk be assumed regarding the maintenance of public areas, it be assumed by the landlord who advertised and solicited tenants, rather than by the tenants who signed leases and bound themselves to the payment of rentals.

3. The Court erred in denying appellant's motion for a new trial.

Appellant re-asserts argument as set out under point 2 of this brief.

CONCLUSION

In view of the foregoing:

1. The judgment of the District Court should be reversed and a new trial granted appellant, against both defendants.

Respectfully submitted,

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PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 29 1958

Joseph W. Stewart
CLERK

No. 14,182

PHYLLIS NIELSEN,

Appellant,

v.

BARCLAY CORPORATION,
a body corporate, and
SIDNEY Z. MENSH,
t/a SIDNEY Z. MENSH & COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL W. O'DONOGHUE
ROSS O'DONOGHUE
Union Trust Building
Washington 5, D. C.

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

PHYLLIS NIELSEN, Appellant	)	
v.	)	No. 14,182
BARCLAY CORPORATION, a body corporate, and SIDNEY Z. MENSH, t/a SIDNEY Z. MENSH & COMPANY, Appellees	)	

PETITION FOR REHEARING

Come now the appellees and by their attorneys move this Honorable Court for a rehearing in the above-entitled case for the reason that the decision is not based on the law of this jurisdiction, is not supported by the cases cited, and reaches incorrect conclusions of law.

There Was No Obligation to Light When the Absence of a Light Was Evident on Letting

The Court states at page three of the slip opinion that apart from any possible general duty to illuminate the entrance "there was . . . a clear question presented of whether failure to light this entranceway was negligent under the circumstances. . ." and cites as authority for this proposition Pessagno v. Euclid Inv. Co., 72 App. D.C. 141, 112 F.2d 577 (1940), but as Judge Groner said for the Court in that case:

> "The facts of the case raise a single question: Is a landlord who rents apartments in his building to various tenants and reserves control of the common approaches, obligated to use reasonable care, during the progress of a storm, to remove or render harmless ice forming thereon from natural causes?" (72 App. D.C. 142)

Even to extend the theory of the case to lights, the case is only authority for the proposition, that appellees concede, that a landlord is obliged to maintain common entranceways and passageways in the same good order that they were in at the time of letting. He may not allow the accumulation of ice, the breaking down of stairways or the failure of illumination initially provided. This is the rationale, too, of Kay v. Cain, 81 U.S. App.D.C. 24, 154 F.2d 305 (1946). There the landlord failed to replace a bulb that illuminated an entranceway, but that fixture and bulb were in place at the time of letting.

There is a vast difference in the principle involved in maintaining premises in the same condition as when rented and being chargeable with negligence upon failing to do so and the letting of premises in a particular condition which subsequently results in injury but which was manifest to the lessee and was not hidden and known only to the landlord. This is the distinction made in many cases in this jurisdiction, for example in Wardman v. Hanlon, 52 App. D.C. 14, 280 F. 988 and Carusi v. Schulmerick, 69 App.D.C. 76, 98 F.2d 605. It is certainly the theory on which this Court relied in Harrison v. Mortgage Inv. Co., 61 App.D.C. 155, 58 F.2d 881. Yet This Court neither overrules or distinguishes it in its opinion.

What then are "the circumstances" alluded to by the Court when it says that a question of negligence is presented whether failure to light "under the circumstances" constitutes negligence? It does not say that either a common law or statutory duty has been violated. On what other basis is the obligation to be based?

Appellant was Clearly Negligent

Further, the Court says that the jury could reasonably have found the appellant not to have been negligent in proceeding as she did. But it is submitted that there could be no more certain case of negligence on the part of any plaintiff than was the case with this appellant.

On a dark night, with no artificial illumination of any kind that she could see when she ventured forth, appellant left a position of safety without any urgent necessity to proceed through a dark and unfamiliar territory when there were immediately available persons to help her who were familiar with the premises. It is true that when she got to the actual entrance there was some slight illumination, but she undertook the walk without being aware of this and in circumstances of absolute darkness.

This was not the situation of Hill v. Raymond, 65 App. D. C. 144, 81 F. 2d 278, cited by the Court, for there the appellant was familiar with the stairway, he was under the urgent necessity of leaving the premises to go to work and there was no one available more familiar than he to help him. There the Court said at 65 App. D. C. 146:

> "Coming to the question of contributory negligence on the part of the plaintiff, we think the law is well settled that the mere continued use of a tenant of common stairs and hallways of the tenement premises, when he is aware of the failure of the owner to provide lights, as required by the statute and municipal regulations, does not constitute contributory negligence as a matter of law, but merely raises a question for the determination of the jury. This situation is closely analogous to cases where tenants or persons accustomed to using a stairway and knowing of defects therein are injured as a result of those defects. . ."

Manifestly the cases are not comparable. Every conceivable element constituting negligence on the part of the appellant were present here. The jury cannot possibly reasonably find that there was no negligence on her part and the District Court was clearly right in its decision to refuse to allow the jury to consider the question.

The Court Misconceives the Theory of Assumption of the Risk

The Court says at page four of the slip opinion that "the jury could reasonably have found . . . that neither she [appellant] nor her hosts, the tenants, assumed the risk", citing Dougherty v. Tompkins Co., 99 U. S. App. D. C. 348, 240 F. 2d 34 (1957), as authority. Not only is this

case not authority for this statement but, indeed, the case actually supports appellees' theory. The case holds that a user of a sidewalk has a right to assume that a public sidewalk will be properly maintained. But the Court said at 99 U. S. App. D. C. 350:

> ". . . Thus a landowner is not obliged to maintain safe premises for licensees or invitees since they assume the risk upon being informed or having notice of a dangerous condition."

Here, the open and apparent construction is the equivalent of notice to the tenants, Harrison v. Mortgage Investment Co. (supra), and the guest of tenant stands in tenant's place in this respect. Bowles v. Mahoney, 91 U. S. App. D. C. 155, 158, 202 F. 2d 320. This is purely a question of law and is not conceivably a jury question. The District Court was correct in so holding.

The Opening Statement Made No Justiciable Claim Against Manager of Building

An opening statement must do more than state that a defendant owed a duty to the plaintiff. It must recite facts which, if proved, will justify a recovery. Here the opening statement gives no such facts. Clearly it is not the duty of a manager to see that a building is constructed in a particular way, and it cannot be considered negligence if he undertakes to manage an apartment whatever its construction, and whether or not such construction complies with the building regulations. It is perfectly possible for this Court to say, as did the lower Court, that even if the facts asserted were proved, they would not constitute any breach of duty on the part of the management.

Accordingly, appellees respectfully request a rehearing of this case.

DANIEL W. O'DONOGHUE and
ROSS O'DONOGHUE

By

Ross O'Donoghue
Union Trust Building
Washington 5, D. C.

I hereby certify that the foregoing Petition for Rehearing is made in good faith and not for purposes of delay.

Ross O'Donoghue

CERTIFICATE OF SERVICE

I hereby certify that service of a copy of the foregoing Petition for Rehearing was made upon appellant by mailing a copy thereof, postage prepaid, to her attorney, Harry W. Goldberg, Esq., 1511 K Street, N. W., Washington, D. C., this 29th day of May, 1958.

Ross O'Donoghue

BRIEF FOR APPELLEES

BARCLAY CORPORATION AND SIDNEY Z. MENSH, t/a SIDNEY Z. MENSH & COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeals
For the
District of Columbia Circuit

No. 14,182

FILED
1958
289
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PHYLLIS NIELSEN, *Appellant*

v.

BARCLAY CORPORATION, a body corporate and SIDNEY Z. MENSH, t/a SIDNEY Z. MENSH & COMPANY, *Appellees*

Appeal from the United States District Court For the District of Columbia

DANIEL W. O'DONOGHUE
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Attorneys for Appellees

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Is not a person negligent as a matter of law who proceeds alone through a totally dark area with which she is not familiar at, at least, a normal speed where the darkness was evident before she ventured into it, where there was no compelling reason for her to proceed and where persons familiar with the place were immediately at hand to assist her.

2. May a guest of tenant complain of injuries alleged to have been sustained as a result of perfectly apparent structural conditions which tenant could readily have observed and which had not been changed from the date of renting.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,182

PHYLLIS NIELSEN, *Appellant*

v.

BARCLAY CORPORATION, a body corporate and SIDNEY Z. MENSH, t/a SIDNEY Z. MENSH & COMPANY, *Appellees*

Appeal from the United States District Court For the District of Columbia

---

BRIEF FOR APPELLEES

BARCLAY CORPORATION AND SIDNEY Z. MENSH, t/a SIDNEY Z. MENSH & COMPANY

RESTATEMENT OF THE CASE

Appellant was the friend of Howard Tanner and John Nielson, (J. A. 20) who had rented and were moving into an apartment in a newly erected (J. A. 45) and not yet completed apartment building (J. A. 9) located at 2610 Tunlaw Road, N.W., owned by the appellee, Barclay Corporation.

The apartment house was one of a pair that faced each other across a court (J. A. 34), the entrance being in the middle of the building facing on the court some fifty feet from Tunlaw Road (J. A. 32) "about the distance . . . of an apartment with several rooms in it . . . about the distance of a full length of an apartment." (J. A. 25) "A concrete walk . . . led from Tunlaw Road half the length of the building, then made a right angle turn into the entrance way to the building" (J. A. 32). There were two steps up to a little porch (J. A. 15, 24, 25, 32) three or four feet deep (J. A. 32) then another step up to the threshhold (J. A. 24, 32).

Prior to the night of February 26, appellant had been to the building twice, both times in daylight (J. A. 39), but on one of those occasions when she had accompanied Mr. Tanner (J. A. 20), to "give a woman's view on it" (J. A. 19) she was unable to approach the building because of a newly laid wet cement walk (J. A. 20, 38). The building was locked up at that time (J. A. 20). The other time that she had been to the building, she was carrying boxes or bundles when she entered and somebody held the door open for her (J. A. 19, 39) and on leaving she "paid no attention to the entranceway." She had no "recollection of opening the door" since "one of the boys opened it" (J. A. 19, 39). It was daylight when she left (J. A. 39). On that day she went in only once (J. A. 19, 24).

On February 26, 1954, appellant went with Mr. Nielson and Mr. Tanner, who planned to move in some household effects which were in a trailer attached to Mr. Tanner's car in which they were all three riding (J. A. 41). Mr. Tanner parked the car between the two buildings (J. A. 20, 40) where at the time there was nothing but mud, although later a lawn was laid (J. A. 34). There was no "curbing out at the street at that time . . . it was possible to just drive directly into this opening which had

no lawn on it." (J. A. 40). The car was parked "toward the end of the walk . . . closer to the road." (J. A. 25).

They reached the the apartment building "around 6:30" and "it was entirely dark by this time of evening" (J. A. 20, 26). "There was no street lighting which shone between the two buildings which in any way illuminated the space between the two buildings (J. A. 33). "There were no street lights at all" on either side of Tunlaw Road (J. A. 34-35). There were no lamp posts of any kind on the building that furnished light in the area between the buildings (J. A. 34). "There was no light in the court" (J. A. 35). There were no "lights strung over the court in the form of bulbs" (J. A. 35). There were no "lights on poles coming out of the front of that court" (J. A. 35). There were no "lights of the type that the City uses with large globes on them in the court" (J. A. 35). There were no lights on the parking lot at the opposite end of the building, which lot is about 150 feet square (J. A. 35-36). There were no "lights located on the walk from the curb back to the entranceway to 2610 Tunlaw Road" (J. A. 36). There were no "lights running along the ground such tiny small illuminating lights which sometimes light up walkways and steps (J. A. 36). There were no posts, poles, or any other permanent type of fixed illumination from that walkway back from the street to the building entrance (J. A. 36). There was no "light at all on the outside of the building" (J. A. 36). There were no outside lights and no "lights from the apartment building shining outside" (J. A. 25). There was "no electrical fixture in that overhang" over the entrance to the building and nothing "in the overhang which would indicate a receptacle for an electrical bulb or for an electrical fixture" (J. A. 36). There was no light fixture "inside the door as you enter" (J. A. 39-40). There was no lighting fixture in the vestibule (J. A. 40). "There was, as I have indicated previously, no lights on the overhang outside the building, no light

outside the building, and there were no lights in the vestibule immediately inside the entranceway" (J. A. 43). The only interior light was up a flight of steps and was not in line with the outside entrance (J. A. 43). There was no "light to be seen on either side of the entranceway near the entranceway" (J. A. 43). There was no "light whatever in the entranceway or on the outside of the building in that area" (J. A. 43).

It was quite dark when they drove up (J. A. 46) and "it was dark, or very dim" along the walkway "between the car and the door" since no "lights illuminated it" (J. A. 44). Appellant could not see the entranceway when they parked the car that night although in daylight she could have seen it "very plainly" (J. A. 25). She couldn't see it because there were no lights outside and none shining from the building (J. A. 25).

As she was getting out of the car, Mr. Tanner asked appellant to take the key of the apartment and go ahead of them to open it (J. A. 41, 46). To effect this purpose she went alone from where the car was parked near the far end of the path from the entrance (J. A. 25) along the dark path toward the entrance (J. A. 21) although she "was not familiar with the area" (J. A. 46). It was so dark that although she heard the footsteps of someone coming in the opposite direction and going through the doorway when she was going in, she "would not say that she could see" them but she knew "someone was in the vicinity because [she] heard them". She "heard the footsteps" (J. A. 27). She "heard the sound that footsteps going up the steps make". She "heard somebody and . . . got the impression that somebody had gone in the doorway" (J. A. 29). The reason she couldn't see them was "It was very dull" " . . . it was dark outside" (J. A. 29).

She "was walking at a normal rate that anybody would walk under those lighting conditions" (J. A. 30). She

"was not groping along", "putting her foot forward to feel her way", nor "putting [her] hands forward to feel the way." (J. A. 30) She "started to step into what [she] thought was an opening and something hit [her] in the face" (J. A. 21) which stunned her or knocked her unconscious (J. A. 30). She felt a flash of pain in her face (J. A. 31) and the next thing she remembers she was opening her eyes while lying on the walk "straight out from the steps" with her foot "touching the step" (J. A. 31). "In the center of the pane of glass on the right there was the impression of a face, that is the forehead and the chin, and a pushed up impression of a nose. You could actually make out the nostrils" (J. A. 43). "It was . . . at about Mrs. Nielsen's height" (J. A. 43) and "that impression remained on the glass for a day or two after the accident (J. A. 43).

The building was not completed at the time of the accident (J. A. 9); the electrical work not being completed until approximately April 4, 1954 (J. A. 52.) The building was newly constructed (J. A. 45) and early in February when Mr. Nielsen first went to it, it was not occupied at all (J. A. 45). Mr. Tanner and Mr. Neilsen had both moved into the apartment at the time of the accident, and the structural condition of the building remained exactly the same from the time of moving in until the time of the accident (J. A. 45). The existence or non-existence of lighting fixtures was easily observable (J. A. 45). There were no lighting fixtures anywhere prior to the night of the accident that were not there the night of the accident (J. A. 45).

In the District of Columbia Building Code Article 602, "the purpose of [which] article is to provide for exit signs and for general and emergency lighting pertaining to exit facilities" (R. 367), there is a provision that "There shall be an emergency white light over all required exit doors on the outside of the building, except

where determined by the Director of Inspection that adequate public street lighting is present" (J. A. 16).

When anyone proposes to build a building in the District, the plans, as far as the electrical layout is concerned, are submitted to the electrical engineering section, where they "go over all the electrical designs to see whether or not he complies with the regulations, and if there is any question about it, [they] call in the architect or the engineer to discuss it at that time and disposition is made in the electrical section by the electrical engineers (J. A. 46-47). Any questions about compliance with the regulations, exceptions thereto, etc., would be made by the Electrical Engineers Office and notations concerning it would be made on the blueprints (J. A. 47-51). Without the blueprints, it is impossible to tell what the requirements of the Electrical Engineer may have been (J. A. 51-52). But the blueprints of this building are not available since one or two years after the completion of the building they are discarded. (J. A. 55).

The indication is that no outside light was required by the Electrical Engineer, since the inspection on February 11, 1954, by the Electrical Inspectors revealed only minor defects in the electrical installation, none of which related to any ouside light or lack of one (J. A. 52-54).

SUMMARY OF ARGUMENT

Appellant was negligent as a matter of law in proceeding on a dark night through a dark area where there was no artificial illumination, where the darkness was apparent before she ventured into it, where she was unfamiliar with the area, where there was no necessity or compelling reason for her to proceed at all and where there were persons available to assist her who were familiar with the area. Yet she proceeded so incautiously through the dark as to hit her face a severe blow which knocked her unconscious and threw her back a consider-

able distance. There being no mitigating circumstances whatever to justify taking the manifest risk of proceeding in the dark, appellant's negligence became a matter of law and the Court therefore properly instructed the jury to find for the defendants.

The construction of the building and the arrangement of lighting fixtures about which plaintiff complains were entirely evident and were in no way concealed. They remained in exactly the same condition from the time of letting to the time of plaintiff's accident. Neither a tenant nor a guest of tenant, who stands in the right of tenant, can complain of injury resulting from manifest structural conditions which were unchanged from the time of letting. A tenant and his guests assume the risk of occupying a building before its completion and cannot complain of deficiencies that have not yet been installed, especially if there lack is apparent. There is no showing that any building regulation was violated in not having a light over the entrance. The indications are that the appropriate municipal authorities did not require a light over the entrance. A landlord has no common law duty to illuminate entrances or exterior stairways. There was no statutory duty to do so here.

The regulation on which plaintiff relies is for the purpose of enabling persons in a building to find their way out in an emergency and was not designed to protect persons entering a building without any necessity.

ARGUMENT

I.

Proceeding Alone in the Dark in Unfamiliar Surroundings Without Compelling Reason Where Assistance is Available is Negligence as a Matter of Law.

The testimony of appellant and her husband establish beyond any question that in complete darkness and in the total absence of any artificial illumination she undertook to go alone into a dark building with which she was

unfamiliar and without any impelling reason. She did this without seeking readily available help and apparently without caution. As a result, she ran into a glass panel which she was unable to see because of the darkness. Under such circumstances, the courts throughout the country universally hold such action to be negligence as a matter of law.

At page 613 of 163 A.L.R., in the course of a compendium of the cases dealing with "*Entering dark places on unfamiliar premises as contributory negligence*", cases dealing with facts constituting exceptions to the general rule, are introduced as follows:

> "In the following cases where the injury arose as a result of entering into a dark or unfamiliar premises, because of various considerations, such as the fact that there was some exercise of caution on the part of the injured person; that the accident occurred in a certain place where the injured person had possibly some right to assume that the place was safe; that the darkness was not impenetrable; that the injured person in going into the dangerous place relied somewhat upon the advice and direction of some employee on the premises; that there was some impelling necessity for going into the place where the injury occurred; that there was not sufficient opportunity to discover the danger prior to the accident; that there were circumstances tending to mislead prudent persons; the sufficiency of the warning of danger,"

a question of fact may be presented.

None of the circumstances that would raise a question that would justify sending the case to a jury exist in the instant case. Rather, all of these elements are lacking and it is instead a virtually classic example of pure negligence on the part of appellant unrelieved by any mitigating circumstances.

The night was completely dark and there was no light from any source that would shed any light on the course

appellant chose to take. She was able to perceive that such was the case while she was in a perfectly safe place in her friend's car, which she was under no compelling reason to forsake. She did not come upon the dark place suddenly and without any reasonable possibility of avoiding it. She could easily see that if she were to approach the building she would be obliged to run the risks of complete darkness.

The circumstances are quite different from *Young Men's Shop* v. *Odend'Hal,* (1949), 73 App. D.C. 354, 121 F.2d 857, on which appellant relies for in that case the plaintiff

> " . . . came upon the dangerous condition entirely unawares and was caught by it before he had an opportunity to realize that danger existed . . . In other words, the dangerous condition of the entrance caused the fall to come about practically by reflex action rather than as a result of proceeding deliberately and with forewarning into an unknown situation. The cases which defendant cites to support its contention concerning contributory negligence deal with situations where the facts show there was opportunity for observation before proceeding into the dangerous surroundings. In some of them, too, the evidence shows that the plaintiff was proceeding hurriedly and without attention. Cf. De Honey v. Harding, 8 Cir., 1924, 300 F. 696."

It seems evident from that statement that this Court would have decided the case differently if, as in the present one, the plaintiff had proceeded from a place of safety deliberately into an obviously dark and unfamiliar area.

The fact which distinguishes this case most forcibly from the majority of the cases which hold that there is a jury question is that there was here no necessity or compelling reason for the appellant's taking risks that are inherent in proceeding in the dark. She was neither in a place that she needed to leave, such as another per-

son's apartment, late at night, in order to return to her own abode; nor did she live in the place where the darkness existed which would necessitate traversing the darkened area in order to get to her own home.

It seems quite reasonable for the courts to leave the question of negligence to the jury where a person finds himself in a darkened building where he does not live and which he is anxious to leave to return to his own home. It is then a question for the jury to determine whether such person acted reasonably in attempting to leave such a place, even though in the dark. In other words, did he act unreasonably in his evident dilemma?

Another situation comparable to this is that of a tenant advancing through the darkness of a building to the apartment where he lives. Here again, it may not be unreasonable for such a person not to want to huddle on the doorstep or spend the night outside. The question for the jury is then whether, on balance, the tenant was justified in taking the risk for so compelling a reason.

These factors are particularly apparent in cases in the District of Columbia involving injuries in dark places on which the appellant relies. For example, in *Kay* v. *Cain*, (1946), 81 U. S. App. D. C. 24, 154 F. 2d 305, the plaintiff was familiar with the area of darkness for he had been a tenant of the apartment house for some time and had been in the habit of using the entrance in question. In order to go home to bed, he might reasonably be expected to use even a darkened entrance. Furthermore, he did not expect it to be dark, since there was a light fixture at the entrance. The bulb was burned out. Clearly a jury question was presented as to the reasonableness of his action.

The same principles apply to *Hill* v. *Raymond*, (1935) 65 U. S. App. D. C. 144, 81 F. 2d 278. The plaintiff in that case had been a tenant of the rooming house for some

time and customarily went up and down the steps where he was injured in order to enter or leave his room. He was required to go to work early in the morning and, therefore, found it imperative to leave his room and use the stairway even though it was dark. Obviously such circumstances raise a question of whether a reasonable person might not attempt to use this stairway even in the dark.

But the appellant here was in neither dilemma. She was outside of a building where she did not live and which she had only the slightest and least compelling reason to enter. She did not even need to go in, in order to see the people living there, for she was already with them. Getting their household goods into the apartment was of no vital concern to her. She could quite easily, safely and comfortably have stayed in the car while the goods were carried in, rather than preceding her friends in the darkness.

Another circumstance which might have raised a question as to appellant's reasonableness in proceeding if it had existed, would have been her familiarity with the premises. If she had frequently been in and out of the apartment house and knew of its particular arrangement and construction, it might be possible to conclude that she was not negligent in proceeding as she did. But she had been on the premises only once before, had been carrying bundles at that time, had had the door opened for her and had paid no attention to the entrance. She was thus almost entirely unfamiliar with it. Advancing in the dark into unfamiliar premises is certainly negligent. The circumstances of familiarity were also distinguishing factors in both *Kay* v. *Cain* and *Hill* v. *Raymond, supra.*

Still another factor that courts have taken into account in determining whether there has been negligence as a matter of law is whether the injured person sought assistance or whether advancing alone was necessary because

no assistance was available. Here there was assistance immediately available to appellant in the persons of Mr. Nielson, her future husband, and Mr. Tanner, both of whom were living in the apartment house and were familiar with its approaches and its entrance. There was no circumstance whatever justifying appellant's proceeding alone. The mere fact that her friend asked her to go ahead to open the place so that they could carry in household goods and thus save a couple of minutes' time, merely illustrates the triviality of her reason in going ahead alone when assistance was so easily available.

Furthermore, the evidence adduced by appellant makes it clear that she can hardly have been advancing with caution. She testified that she was not groping, was not feeling ahead with her hands and feet, but was walking at a normal rate. But the most interesting evidence in this respect is that she struck the glass with such force as to leave the print of her face on it, including the pushed-up impression of the nose, even the nostrils. The blow knocked her unconscious and impelled her back across a porch three feet deep, down two steps, and down a path, so that her head was her body's length away from the porch with her foot touching the step. Such evidence would seem conclusively to exclude the possibility that plaintiff was proceeding with caution in the circumstances that she and her husband have so vividly described.

It seems safe to say that any court in the country would feel obliged to conclude as a matter of law that appellant was guilty of negligence in circumstances such as these. For, as the Supreme Court of Colorado said in *Miller-Dupont, Inc.* v. *Service,* (1949) 121 Colo. 131, 208 P. 2d 87, in upholding a directed verdict in the case of a plaintiff proceeding in the dark in circumstances similar to the instant case:

> ". . . It does become the duty of the court to determine as a matter of law, whether a litigant is guilty of contributory negligence barring a recovery where

> all the evidence and the legitimate inferences to be drawn therefrom are not in dispute, and where the precise measure of plaintiff's duty is determinate and a rule of duty in a given situation is clearly defined."

The courts of many states have reached the same conclusion. A few examples from some of the principal states, usually involving darkened common ways in apartment buildings, may be cited. For example, in *Hart* v. *Sullivan,* (1944) 324 Ill. App. 243, 58 N. E. 2d 301, 303, the court found:

> ". . . Without familiarity with the premises and without any urgent necessity to do so, deceased persisted in ascending the steps, crossing the first landing and advancing through the door to the west in utter darkness. Such conduct has been held to be contributory negligence as a matter of law."

And in Massachusetts, in *Osgood* v. *Therriault* (1935), 290 Mass. 513, 195 N. E. 734, 735, in upholding a directed verdict for defendant, the court stated:

> ". . . As a person of ordinary experience she knew that one who walks in the total darkness of a strange hallway is likely to encounter obstructions to her passage and pitfalls to her feet."

In summarizing the New York cases involving such circumstances, the New York Court of Appeals said in the case of *Rohrbacher* v. *Gellig,* (1918), 203 N. Y. 413, 418, 96 N. E. 733, 734:

> "The principle, which these decisions have established, is that a person, coming into such an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any special stress of circumstances, in proceeding further, without first finding out where he is going and what may be the obstructions to his safe progress."[1]

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[1] Other New York cases of similar import are: *Brugher* v. *Buchtenkirch,* 167 N.Y. 153, 157, 60 N.E. 420, 421; *Piper* v. *New York Central,* 165 N.Y. 224, 230, 50 N.E. 851, 853.

Turning to New Jersey, the courts there reached the same conclusion. For example, in *Rado* v. *Zlotnick* (Superior Ct. of N. J., App. Div. 1950), 7 N. J. Super. 197, 73 A. 2d 533, the court affirmed a directed verdict for defendant, saying:

> ". . . He was under no compulsion to take the path he took, and he made no effort to secure the aid of a light. Since he deliberately incurred the obvious risk, he cannot hold the defendants for the ensuing damage, even though the defendants created the dangerous condition."

In another case from the same state, *Nauman* v. *Central & Lafayette Realty Co., Inc.* (Sup. Ct. N. J. 1948), 137 N. J. L. 428, 60 A. 2d 428 (affirmed on opinion below by Sup. Ct. of N. J. 1948, 62 A. 2d 218), in circumstances similar to the present, the court sustained a directed verdict. There the plaintiff had complained that because of the inadequacy of light on the landing, which was described as like "a dark twilight", two sections of the landing appeared to be blended into one. The court commented on the plaintiff's dilemma as follows:

> "To recover, it was the responsibility of the plaintiff to prove by the preponderance of the evidence that the proximate cause of his injuries was the failure or lack of lights. . . If that be so, then he assumed to his knowledge the risk of danger from the very thing which is the foundation of the complaint.
>
> "The test is whether an ordinary prudent person would under the same or similar circumstances have incurred the risk which such conduct involved. . . Where it indisputably appears to the contrary, the question is one of law for the Court."

The Supreme Court of Pennsylvania has had a number of cases involving proceeding in dark places to consider and as a result has worked out a formula which it restated in *Ellis* v. *Drab,* (Sup. Ct. of Pa. 1953), 94 A. 2nd 189, 373 Pa. 189. There a guest of a tenant was injured in leaving an apartment where light bulbs in a hallway were burned

out and the handrail had been removed. Affirming an involuntary non-suit, the court, in speaking of prior cases, lists the

> ". . . rules drawn from them: (1) where a person proceeds in absolute darkness without reasonable necessity, he is guilty of contributory negligence as a matter of law and (2) where there is a 'fairly compelling reason' for walking in a place which is dark, but not utterly devoid of light, the question of contributory negligence is for the jury."

In Ohio the courts will also hold proceeding in the dark without compelling reason to be negligence as a matter of law. For example, in *Petrey* v. *Liuzzi* (Ct. App. Ohio 1945), 61 N. E. 2d 158, 161, the court affirmed a directed verdict for defendant, saying:

> "It is not left in doubt that the plaintiff with full knowledge that the defendant had not provided any way of lighting this stairway and that it was dark, proceeded to use the stairway, trusting to her ability to use it safely by means of light supplied by matches with which she had provided herself. Under such circumstances it must be held that she was the author of her own misfortune."

But we may return to this Court and to a recent case to find the propriety of a directed verdict in circumstances similar to the instant case to have been declared justified. In *Tissue* v. *Volta* (decided December 12, 1957), — U. S. App. D. C. ——, ——F. 2d ——, a tenant of an apartment building was walking in the dark without any real necessity, through a back yard common to her building and an adjoining one and was injured when she fell into an areaway. This Court sustained a directed verdict for the defendant. The Court said that "a landlord is not liable for injuries suffered as a condition of a premises, if the condition is not unreasonably dangerous to those with knowledge of it." The facts were thus like the present case for here the condition was not dangerous to those with knowl-

edge of it. It was only dangerous because appellant couldn't see a panel that was perfectly evident except for the darkness.

II.

Readily Observable Structural Characteristics Which Remain Unchanged from the Beginning of the Tenancy Cannot be Complained of by Tenant or His Guests.

Injury which it is claimed resulted from structural conditions which are manifest at the time of letting and are in no way concealed cannot be complained of either by a tenant or a guest of a tenant. The appellant here complains that there was no light at the entrance to the apartment house and that a glass panel next to the entrance was not apparent at night. But the testimony of Mr. Nielsen establishes that the glass panel was precisely the same at the time he first moved into the apartment as on the night in question. He furthermore stated that there were no lighting fixtures over the doorway or anywhere else in the vicinity and that this condition was perfectly evident. In such circumstances, *Harrison* v. *Mortgage Investment Company,* (1932) 61 App. D. C. 155, 58 F. 2d 881, must control. This Court there held:

> ". . . Here the parents leased the apartment with knowledge of the structural condition of the stairway. They made no complaint and exacted no promise to change the condition, and thereby they assumed whatever danger there was in the use of the stairway so long as it was not allowed to get into disrepair. Neither the one nor the other of them would now be heard to complain of an injury resulting alone from the structural character of the stairs, and, in our opinion, their infant child stands in no better position. She was using the stairs in the right of her parents as tenants, and if the circumstances are such that they cannot recover, neither can she."

Bowles v. *Mahoney,* (1953) 91 U. S. App. D. C. 155, 158, 202 F. 2d 320, holds that a guest of a tenant occupies the

same position as did the child of the tenant in the *Harrison* case, saying:

> ". . . The rule is that the duties and liabilities of a landlord to persons on the leased premises by the invitation of the tenant are those owed to the tenant himself. . . It follows that Mrs. Bowles is not liable for the child's injuries unless she would have been liable to her tenant, Luke Gaither, had he been injured under similar circumstances."

Incidentally, the *Harrison* case was quoted with approval by this Court in the *Bowles* case at page 159.

Surely, if there is assumption of the risk in occupying a completed building with evident defects, *a fortiori* the assumption of the risk must be evident where tenants are willing to move in before completion. They must necessarily take it for granted that all of the facilities and perfection of a completed building will not yet be found. They are willing to accept the possible risks of its unfinished condition.

III.

Appellant Has Failed to Establish any Evidence of Negligence by Appellees in Construction of Building.

Appellant contends that there was evidence of negligence on the part of the landlord in failing to have a light over the entranceway as allegedly required by the Building Code of the District of Columbia, and for that proposition relies on *Hill* v. *Raymond,* (1935) 65 U. S. App. D. C. 144, 81 F. 2d 278. In the first place, of course, the Court need not reach this question if it sustains the court below in its clearly correct conclusion that appellant herself was negligent. But appellant has not established that there was any requirement for a light over the entrance. The regulation, of course, does not require such a light if there was adequate street lighting. That determination would have been made by the Electrical Engineer of the District and if the light had been required, it would have

appeared on the approved blueprints. Although these blueprints have no longer been preserved at the District Building, the clear inference from the testimony is that no such light appeared on the prints approved by the District Electrical Engineer and passed on to the Electrical Inspector to make certain that the installation was according to the approved plans. Testimony showed that although there was no light, no fixture and no wires over the door as late as February 26, inspections during February by the electrical inspectors had not mentioned this lack as a defect to be remedied. In the inspection of February 11, only a few minor defects were noted and this was not one of them. If it had appeared in the blueprints, which the inspector had a copy of, undoubtedly he would have insisted that this deficiency be supplied. It can only be concluded from his failure to mention it as a defect that it was not so considered and the approved plans did not require such an installation.

Furthermore, even if a safety regulation would require a light over the door, it was manifestly not for the purpose of protecting persons in the class to which appellant belonged. It seems evident from the regulation itself that the requirements are for an emergency exit light which, in conjunction with various other lights, are for the purpose of enabling persons caught in the building in an emergency such as a fire to find their way out. It had no general function of lighting the entrance for the use of persons who desired to enter, and there is no common law duty to do so. Accordingly, there can be no basis for claiming the lack of a light over the doorway as being even evidence of negligence on the part of the owner.

IV.

There Is No Basis for Holding Managing Agent Responsible

It is hardly necessary to mention appellant's contention that the trial court erred in directing a verdict for the managing agent of the building on appellant's opening

statement. Suffice it to say, that there is no case in the District of Columbia in circumstances like this where a managing agent has been found liable. Appellant cites no cases from any jurisdiction so holding, nor have appellees discovered any.

CONCLUSION

The uncontroverted evidence of appellant and her husband show beyond question that her actions constituted negligence as a matter of law which required a directed verdict for the defendants. As a guest of a tenant, she cannot complain of obvious structural characteristics that remained unchanged from the beginning of the occupancy. There is no showing of the violation of any ordinance, and indeed the one alleged to have been violated is not for the protection of the class to which appellant belonged.

Accordingly, the District Court's judgment should be affirmed.

Respectfully submitted,

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